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Supreme Court, U.S.
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NO. _____

IN THE

UNITED STATES SUPREME COURT

RICHARD L. ABBOTT, ESQUIRE - PETITIONER

vs.

OFFICE OF DISCIPLINARY COUNSEL FOR THE SUPREME COURT OF THE STATE OF DELAWARE - RESPONDENT

ON PETITION FOR WRIT OF *CERTIORARI* TO

THE SUPREME COURT OF DELAWARE

PETITION FOR WRIT OF *CERTIORARI*

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Dated: July 31, 2007

QUESTIONS PRESENTED

I. Whether lawyer written speech which is not proscribed by any objective rule of professional conduct is protected speech under the 1st Amendment?

II. Whether the 14th Amendment Due Process Clause prohibits a State Supreme Court from disciplining an attorney for a new violation and an additional Count raised at the conclusion of the disciplinary process, without providing any notice or hearing?

III. Whether the United States Constitution's *Ex Post Facto* Clause and the 14th Amendment's Due Process Clause bar a State Supreme Court from retroactively applying a completely new and unforeseeable interpretation of rules of professional conduct to discipline an attorney?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF *CERTIORARI*

Petitioner respectfully prays that a Writ of *Certiorari* issue to review the judgment below.

OPINIONS BELOW

The opinion in the highest State Court to review the merits appears at Appendix A to the Petition and has been designated for publication but is not yet reported or is unpublished.

In re Abbott, Delaware Supreme Court No. 676,2006 (May 2, 2007)

In re Abbott, Delaware Supreme Court No. 676,2006 (May 9, 2007)

JURISDICTION

The dates the Judgments or Orders to be reviewed were entered are May 2, 2007 and May 15, 2007.

The statutory provision believed to confer jurisdiction upon this Court to review the Judgment or Order in question pursuant to a Writ of *Certiorari* is 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. Amendment I to the United States Constitution, Clause 2 prohibiting laws abridging Freedom Of Speech, and Amendment XIV, Section 1 guaranteeing that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

II. Amendment XIV to the United States Constitution, Section 1, Clause 4 stating "Nor shall any State deprive any person of life, liberty, or property without due process of law."

III. Article I, Section 10 of the United States Constitution which provides that "No State shall...pass any...*ex post facto* Law... ," and Amendment XIV to the United States Constitution, Section I, Clause 4 stating "Nor shall any State deprive any person of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

I. Facts Material To Consideration Of The Questions Presented

A. The Petition For Discipline And Applicable Rules Of Professional Conduct

On September 5, 2006, an Amended Petition for Discipline ("Petition") was brought by the Office of Disciplinary Counsel of the Supreme Court of the State of Delaware ("ODC") against Respondent Richard L. Abbott ("Abbott") before the Board on Professional Responsibility of the Supreme Court of the State of Delaware ("Board"). The Petition alleged that the contents of written briefs submitted by Abbott to the Delaware Superior Court ("Superior Court") violated Rules 3.5(d) and 8.4(d) of the Delaware Lawyers Rules of Professional Conduct ("DLRPC"). In pertinent part, the two (2) Rules provide:

> "A lawyer shall not: engage in conduct intended to disrupt a tribunal or engage in undignified or discourteous conduct that is degrading to a tribunal."
>
> and
>
> "It is professional misconduct for a lawyer to: engage in conduct that is prejudicial to the administration of justice."

The Petition was based on fourteen (14) excerpts from briefs filed in a *Certiorari* appeal from an administrative decision issued by a New Castle County ("County") appeal board. The first six (6) brief excerpts criticized the County's attorney for making up reasons for the administrative board members' decision which were not articulated by the Board members when they orally rendered their decision at the conclusion of the appeal hearing. The ODC did not contest the fact that the attorneys' rationale in the written decision was not consistent with the Board's orally articulated reasoning.

Six (6) out of the next seven (7) brief excerpts cited in the Petition included the terms or phrases: "laughably"; "whimsical speculation"; "pure sophistry"; "ridiculous"; denying "a fair and impartial hearing on the merits"; and "magically transmuted." Another brief excerpt was an analogy which pointed out the absurdity of the County's argument that its attorney was free to write whatever he wanted, regardless of the specific reasons cited by members of the administrative board. Lastly, the Petition was based on a Brief footnote which addressed an attempt by the County's attorney to play on any potential bias that the Court might have toward the real estate developer that owned the *Certiorari* Appellant entity, while at the same time expressing full confidence that the Court would properly decide the case.

The Petition alleged that the brief excerpts violated Rule 3.5(d) since they were "intended to disrupt the tribunal and/or by engaging in undignified or discourteous conduct degrading to the tribunal... ." And it further alleged that Rule 8.4(d) was violated since the brief excerpts were prejudicial to the administration of justice on the grounds that they allegedly constituted "inflammatory statements by which [Abbott] implicated the integrity, intellect and competence of the [County] and their attorney." Only two (2) charges were alleged: 1) Count I, which asserted a violation of Rule 3.5(d); and 2) Count II, which asserted a violation of Rule 8.4(d).

Interestingly, the ODC did not allege that Abbott's criticisms of the County and its attorneys violated Rule 3.4 of the DLRPC which governs "Fairness to opposing party and counsel." Indeed, this is the specific rule which regulates conduct between attorneys and opposing parties and their counsel.

Nor did the ODC allege that Abbott's brief language was outside of the bounds of "legitimate advocacy." Comment [3] to DLRPC Rule 8.4 expressly creates a safe harbor for lawyers whose conduct falls within the confines of "legitimate advocacy." Specifically, the Comment provides:

> A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of

justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). (emphasis added).

Paragraph [21] of the Preamble to the DLRPC establishes that the Comments constitute interpretative guides.

B. The Board Hearing And Recommendation: The ODC Did Not Prove Its Case

On September 13, 2006, the charges alleged in the Petition were considered at a hearing conducted by the Board. At the hearing, the ODC's evidence included nothing but three (3) Superior Court *Certiorari* briefs filed by Abbott and counsel for the County. The three (3) briefs were the Opening, Answering, and Reply briefs regarding the *Certiorari* appeal.

With respect to the two (2) charges alleged, the ODC argued that a violation occurred based solely on the "tone and choice of words" used by Abbott in his briefs. The ODC contended that although Abbott's brief excerpts were truthful and relevant, their mere "tone and tenor" was enough to constitute a disciplinary violation. The ODC also conceded that the first prong of Rule 3.5(d), requiring proof of conduct intended to disrupt a tribunal, was not proven since no evidence in support of that charge was presented to the Board.

On December 20, 2006, the Board issued its report regarding the charges alleged in the Petition. Appendix E. The Board concluded that Abbott did not violate Rule 3.5(d) or Rule 8.4(d). The Board reasoned that there was no objective standard by which language criticizing an opposing party and counsel could be deemed to be degrading to a tribunal. The Board also found that Abbott did not criticize the Superior Court, and that no case law supported a Rule 8.4(d) violation.

C. The Delaware Supreme Court Decision: Two New Violations Are Found And A Subjective "I Know It When I See It" Standard Is Adopted

On May 2, 2007, the Delaware Supreme Court issued a decision finding that Abbott committed two (2) violations of Rule 3.5(d) and one (1) violation of Rule 8.4(d) of the DLRPC. Appendix A. This is despite the fact that the Petition only alleged one (1) violation of Rule 3.5(d) and one (1) violation of Rule 8.4(d). The Delaware Supreme Court pinned its Rule 8.4(d) violation finding on the previously uncharged basis that the Superior Court was required to expend time addressing the language contained in Abbott's brief. Thus, two (2) out of the three (3) violations found in the Delaware Supreme Court's decision were raised for the first time *sua sponte* by the Delaware Supreme Court.

The Delaware Supreme Court decision was also based on mere conclusory statements that violations occurred, not on any apposite decisional law or objective legal standards. The Court failed to address Abbott's "legitimate advocacy" defense to the Rule 8.4(d) charge. It also failed to explain how Rule 3.5(d), which is aimed to protect the tribunal, could be stretched to govern the Rule 3.4 scope of "Fairness to opposing party and counsel." Most importantly, the Delaware Supreme Court simply ignored Abbott's defenses based upon 1st Amendment Free Speech and 14th Amendment Due Process arguments.

Abbott timely filed a Motion for Reargument with the Delaware Supreme Court on May 8, 2007. The Delaware Supreme Court summarily denied the Motion for Reargument on May 15, 2007. Appendix B.

II. Stage Of Proceeding When Federal Questions Were Raised, Means of Raising Them and the Way the State Court Passed Upon Them

A. The First Amendment Free Speech Issue

Abbott's challenge to the Petition based upon the assertion that the brief excerpts at issue were protected attorney speech under the 1st Amendment was first raised in the Response To Petition For

Discipline ("Response") filed on July 28, 2006. Appendix C. Specifically, the Response stated that "[t]he claims in the Petition are barred based upon the fundamental right to Freedom of Speech guaranteed pursuant to the 1st Amendment to the United States Constitution... ." Thus, the 1st Amendment defense was properly raised prior to the Board hearing.

Additional arguments regarding the 1st Amendment defense were presented by Abbott at the hearing before the Board conducted on September 13, 2006. And Abbott further elucidated upon his 1st Amendment arguments in his post-hearing written submission to the Board, Respondent's Answering Memorandum In Support Of Dismissal Of Allegations ("Memorandum"). Appendix D.

The Delaware Supreme Court never addressed Abbott's 1st Amendment arguments in its decision.

B. The Procedural Due Process Violations

Abbott first raised his procedural Due Process arguments in paragraphs 23 through 25 of the Response.

Some of the Due Process arguments were not known until the Delaware Supreme Court issued its decision on May 2, 2007. It was not until then that it became clear that the Delaware Supreme Court was going to assert two (2) brand new charges against Abbott, thereby denying him any advance notice and opportunity to be heard on the charges. As a result, Abbott first raised these particular Due Process arguments in his Motion For Reargument filed on May 8, 2007.

In its original decision, the Delaware Supreme Court did not address Abbott's Due Process arguments. In its two sentence *Per Curiam* decision dated May 15, 2007, the Delaware Supreme Court also failed to rule upon Abbott's Due Process arguments.

C. The *Ex Post Facto*/Due Process Issue: An Unforeseeable Interpretation

Abbott first raised the defense that DLRPC Rules 3.5(d) and 8.4(d) had not previously been found to proscribe attorney speech in the form of merely critical and tough comments aimed at an opposing party and its counsel in the Response.

Abbott further explained the nature of his arguments at the Board hearing. Specifically, Abbott pointed out that Comment [3] to Rule 8.4(d) stated that an attorney does not commit conduct prejudicial to the administration of justice "as long as the language or statements do not cross the line in terms of some type of discriminatory comment based on race or sex or religion or ethnic origin... ." Abbott also noted that decisional law had concluded that Rule 8.4(d) could only otherwise be violated if the attorney committed an independent violation of a rule or law.

As for the Rule 3.5(d) allegation, Abbott argued to the Board that the exclusive standard of conduct regarding the treatment of an opposing party and its counsel was found in Rule 3.4. Abbott also pointed out that case law interpreting Rule 3.5(d) (or its predecessor) required proof that the language used was clearly crude, profane, and/or vulgar.

Similar arguments were presented by Abbott in the Memorandum. Attached to the Memorandum were tables of cases: twenty-seven (27) Rule 3.5(d) cases and twenty-five (25) Rule 8.4(d) cases. All of the cases established that conduct distinguishable from Abbott's was necessary to establish a disciplinary violation.

The Delaware Supreme Court did not rule on Abbott's arguments.

REASONS FOR GRANTING THE PETITION

I. LAWYER SPEECH IN WRITTEN BRIEFS CRITICIZING THE OPPOSING PARTY AND COUNSEL ARE PROTECTED BY THE FIRST AMENDMENT WHERE IT IS TRUTHFUL AND IS NOT VULGAR, PROFANE, DISCRIMINATORY, OR THE LIKE

A. Lawyer Speech is Constitutionally Protected

Disciplinary rules which impinge upon a lawyer's First Amendment right to free speech are constitutionally constrained. *Iowa Supreme Court Board of Professional Ethics And Conduct v. Visser*, 629 N.W.2d 376, 380 (Iowa 2001). It is well settled that a lawyer's out of court statements regarding matters involved in litigation are entitled to First Amendment protection. *Id.*; *Commission for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 454 (Tex. 1998), citing *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075-76 (1991). First Amendment protections are even more important where speech involves criticism of the government or government officials (*e.g.* the County and its attorneys). *Id.*

The U.S. Supreme Court has recognized that "debate on public issues should be uninhibited, robust, and wide-open, and...it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Garrison v. State of Louisiana*, 379 U.S. 64, 75 (1964), quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). In fact, the primary purpose for the First Amendment free speech right is the safeguarding of public discussion regarding governmental affairs. *Gentile v. State Bar of Nevada, supra.* at 1034 ("[t]here is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment."); *In re: Green*, 11 P.3d 1078, 1085 (Colo. 2000) (*En banc*).

The Free Speech clause of the First Amendment goes so far as to protect a lawyer's criticism of the legal system and its judges. *Committee on Legal Ethics of the West Virginia State Bar v. Douglas*, 370 S.E.2d 325, 332 (W.Va. Ct. App. 1988). Such speech is only proscribed if it constitutes a knowingly false statement or a

false statement made with a reckless disregard for its truth. *Id.* Indeed, numerous jurisdictions require that even to establish a violation of the Rules of Professional Conduct for criticism of judges, the disciplinary authority must prove: 1) the statement was a false statement of fact; and 2) the statement was made with actual malice – *i.e.* knowledge that it was false or with reckless disregard as to its truth. *In re: Green, supra.* It is important to note, however, that the States' highest courts are split on the proper 1st Amendment standard to apply.

B. The Standard Of Proof For Alleged Disciplinary Violations Based On Lawyer Speech

The standard for establishing a violation regarding the criticism of a government or governmental officials (such as a County and its attorneys) should be no more stringent than that applicable to the criticism of judges. Therefore, the 2-part standard derived from the U.S. Supreme Court's landmark First Amendment free speech decision in *New York Times Co. v. Sullivan* should apply. The standard required proof by the ODC by clear and convincing evidence that Abbott's statements were false, and that they were made with actual malice. Absent proof of each prong of the standard, fundamental First Amendment Free Speech protections provided Abbott with an absolute defense to the disciplinary charges.

Because the ODC did not contend that the excerpts from Abbott's briefs were in fact false, no disciplinary violation could be found. In addition, the ODC failed to show that the Brief excerpts were included by Abbott with knowledge of their falsity or with reckless disregard as to their truth. Indeed, the ODC admitted that it was not challenging the factual or legal accuracy of the Brief excerpts. It was merely pursuing charges based on the "tone and tenor" of the Brief language. Such a subjective standard does not pass 1st Amendment constitutional muster.

C. The Charges Alleged Also Violate Constitutional Free Speech Rights As Applied

The Disciplinary Rules at issue in this case, Rules 3.5(d) and 8.4(d), are also unconstitutional as applied. The U.S. Supreme Court has made it clear that vague regulations of free speech are proscribed based on the need to eliminate the impermissible risk of discriminatory enforcement. *Gentile v. State Bar of Nevada, supra.* at 1051. Indeed, the Supreme Court noted that "history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law." *Id.*

In order to determine unconstitutional vagueness under the First Amendment, the question is whether "the Rule is so imprecise that discriminatory enforcement is a real possibility." *Gentile v. State Bar of Nevada, supra.* Under the circumstances, the ODC and the Delaware Supreme Court attempted to wedge criticisms of the opposing party and its counsel into rules aimed at protecting the judiciary and the judicial system generally. In addition, they attempted to do so in the context of criticisms of the conduct of the government and government officials, not just any plain vanilla opposing party and counsel.

Rules 3.5(d) and 8.4(d) do not plainly state an intent to protect opposing parties and counsel. Nothing in Rule 3.5(d) or 8.4(d) could lead any person to believe that truthful, critical statements about an opposing government party and attorney could give rise to violations of rules protecting the tribunal and its administration. Consequently, disciplining Abbott for his speech is constitutionally proscribed due to the vagueness of DLRPC Rules 3.5(d) and 8.4(d) under the circumstances.

II. FINDING A LAWYER IN VIOLATION OF CHARGES AND ADDITIONAL COUNTS NOT STATED IN THE PETITION, AND RELYING ON MATTERS OUTSIDE THE RECORD, VIOLATES THE DUE PROCESS CLAUSE

A. Constitutional Due Process Principles Require Adequate Advance Notice And Some Form of Hearing Before An Attorney May Be Disciplined

It is well established that attorney disciplinary proceedings are *quasi*-criminal in nature, and that as such they trigger certain Due Process requirements. *In re Ruffalo*, 390 U.S. 544, 551 (1968). It is axiomatic that Due Process requires, at a bare minimum, that a party be provided with notice and an opportunity to be heard. *See e.g. In re Fletcher*, 424 F.3d 783, 792 (8th Cir. 2005). In the case *sub judice*, the Delaware Supreme Court committed a clear-cut violation of Abbott's Due Process Rights when it found that he committed one violation which was not stated in the Petition and which he never had an opportunity to defend against at the disciplinary hearing before the Board.

In the Petition, Abbott was alleged to have violated Rule 8.4(d) prohibiting a lawyer from engaging "in conduct prejudicial to the administration of justice." Specifically, the Petition alleged that:

> The Respondent's written submissions to the tribunal included inflammatory statements by which the Respondent implicated the integrity, intellect and competence of the Appellees and their attorney.

The ODC prosecuted Abbott at the Board hearing under Rule 8.4(d) based solely on the Petition's theory that the language contained in Abbott's briefs, which criticized the County and its attorney, prejudiced the case. The ODC never once suggested that Abbott's briefs caused any problem to the Superior Court itself. Thus, the charge was that Abbott's criticism of the County and its counsel in and of itself constituted a Rule 8.4(d) violation.

In direct contradistinction to the charge alleged, however, the Delaware Supreme Court concluded that Abbott had violated Rule 8.4(d) because:

> The Superior Court, in response to the Respondent's use of offensive and sarcastic language, was required to strike *sua sponte* portions of the Respondent's written arguments and to write an opinion explaining her actions. Thus, the Respondent caused a waste of judicial resources that otherwise would be devoted to the merits of other cases before the Superior Court. (emphasis added).

Rule 9(d) of the Delaware Lawyers' Rules of Disciplinary Procedure ("DLRDP") requires that the charges alleged be those brought in a petition approved by a panel of the Preliminary Review Committee, to which a Respondent has an opportunity to answer and thereafter defend against. These procedural requisites are obviously intended to afford an accused attorney Constitutional Due Process Of Law under the United States Constitution. But the Delaware Supreme Court found Abbott inconvenienced the Superior Court, a charge which was never brought or prosecuted by the ODC. Thus, the Delaware Supreme Court violated fundamental Due Process precepts.

Additionally, the Delaware Supreme Court found Abbott committed a violation of two (2) Counts under Rule 3.5(d) despite the fact that the Petition only charged Abbott with one (1) Count. The applicable rules limited prosecution of Abbott to the specific charges alleged in the approved Petition. The Delaware Supreme Court therefore violated Abbott's Due Process right to be prosecuted in accordance with the applicable procedural rules.

B. The Delaware Supreme Court Also Improperly Found Abbott In Violation of Rule 8.4(d) Based Upon Evidence Not In The Record

As noted above, the Delaware Supreme Court based its Rule 8.4(d) violation finding on an Order issued by the Superior Court.

The Superior Court Order, however, was not admitted into evidence at the hearing before the Board. In fact, pre-hearing motion practice resulted in an agreement that the Order would be excluded from the proceeding. DLRDP Rule 9(f)(3) provides that evidence of any opinions, decisions or judgments shall only be admitted into the record if offered at the Board hearing. The Superior Court Order was not offered, and it was not relied upon by the ODC. As a result, the Delaware Supreme Court's reliance on matters that were not of record violated Abbott's right to Due Process of Law.

III. THE DELAWARE SUPREME COURT DECISION CONSTITUTES AN IMPERMISSIBLE *EX POST FACTO* LAW AND VIOLATES THE DUE PROCESS CLAUSE

A. The Unexpected Interpretations Of Rules 3.5(d) And 8.4(d)

Neither the ODC nor the Delaware Supreme Court could cite to one case which had previously held that tough brief language which did not include any crude, vulgar, profane, discriminatory, or false statements could give rise to a violation of Rules 3.5(d) or 8.4(d). Thus, the decision constitutes the first time that any jurisdiction has made such a finding.

The fact that the Delaware Supreme Court decision constitutes the first attorney discipline finding of its kind is significant. The highest court of each State has the authority to enact rules of disciplinary conduct governing lawyers. Thus, the Delaware Supreme Court acted in a *quasi*-legislative capacity in adopting the DLRPC. And when an unexpected interpretation of such rules occurs, a court is effectively enacting a new rule of law which it is applying *post facto*.

B. The Legal Standard: Fair Warning

The United States Supreme Court has long recognized that criminal provisions must give fair warning of the conduct that is proscribed. *Bouie v. City of Columbia*, 378 U.S. 347, 350-51 (1964). Further, the Supreme Court has recognized "that a deprivation of the right of fair warning can result not only from vague statutory

language, but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Id.* at 352. The Court went on to note that "an unforeseeable judicial enlargement of the criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10 of the Constitution forbids." *Id.* at 353. Indeed, the Court concluded that if the judicial construction was unexpected by reference to the law in affect at the time the conduct occurred, it may not be given retroactive effect. *Id.* at 354.

C. The Decision Ran Afoul Of *Ex Post Facto* And Due Process Protections

In the case at bar, no case from any jurisdiction in the United States concluded that sharply critical language aimed at an opposing party and its counsel could give rise to a violation of Rules 3.5(d) or 8.4(d). Indeed, the Delaware Supreme Court's expectations regarding attorney conduct *vis a vis* opposing parties and counsel is instead expressed in DLRPC Rule 3.4,entitled "Fairness to opposing party and counsel." The finding that merely critical comments aimed at an opposing party and its counsel is "degrading to the tribunal" is a novel one.

Additionally, the conclusion that attorney speech which is protected "legitimate advocacy" may still violate Rule 8.4(d) due to its subjectively distasteful "tone and tenor" was totally unforeseeable under the circumstances. Consequently, the radically new and unexpected interpretation of Rules 3.5(d) and 8.4(d) contained in the Delaware Supreme Court's decision required a prospective application. The Due Process Clause of the United States Constitution and *ex post facto* protections afforded by Art. I, § 10 of the Constitution require no less.

Further, the Delaware Supreme Court's conclusion that the mere suggestion that an opposing attorney was attempting to plead to any possible prejudice the Court might have does not on its face attack the tribunal by alleging a personal bias. The criticism contained in Abbott's brief was aimed at opposing counsel. The Delaware Supreme Court's conclusion that the mere suggestion that an opposing party is trying to play to a Judge's human emotions goes far beyond the pale of existing *jurisprudence* regarding what constitutes a violation of Rule 3.5(d). As a result, this brand new

legal concept may not, by the virtue of the Due Process and *Ex Post Facto* Clauses, be applied retroactively against Abbott.

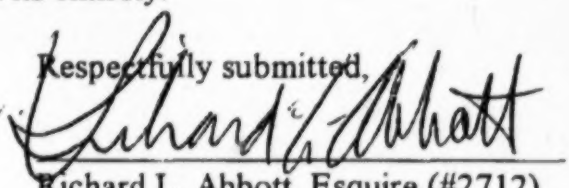
The Delaware Supreme Court effectively rewrote Rules 3.5(d) and 8.4(d) to fit the circumstances. While the Delaware Supreme Court possesses the legal authority to rewrite the DLRPC, it may not do so after the fact. Because this is precisely what the Delaware Supreme Court did in the case *sub judice*, the United States Supreme Court should intervene to correct the constitutional error.

CONCLUSION

The Delaware Supreme Court violated Abbott's Constitutional rights to Free Speech and Due Process of Law. In a case of first impression in the United States, the Delaware Supreme Court concluded that attorney speech which was sharply critical of an opposing party and its counsel was *ipso facto* degrading to the tribunal to which it was presented. No case law from any other jurisdiction had previously held that written statements which were not crude, vulgar, profane, discriminatory, false or directly critical of a court could be "degrading to the tribunal." No fair warning was provided to Abbott that such brief language could give rise to the disciplinary violations found.

The Delaware Supreme Court also raised a new charge and Count and found Abbott in violation of them for the first time in its final decision, thereby denying him his fundamental Due Process right to notice and a hearing and to be adjudicated in accordance with the rules in effect. Finally, the Delaware Supreme Court violated Abbott's 1st Amendment right to Free Speech by failing to apply the standard requiring proof of falsity and actual malice. It was conceded throughout the proceeding that Abbott's statements were truthful; only the "tone and tenor" of the brief language was challenged. For these reasons, the decision of the Delaware Supreme Court should be reversed in its entirety.

Respectfully submitted,



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Dated: July 31, 2007

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN THE MATTER OF A MEMBER OF THE BAR OF THE SUPREME COURT OF THE STATE OF DELAWARE:	§	No. 676, 2006
	§	Board Case No. 8, 2006
	§	
RICHARD L. ABBOTT, Respondent.	§	

Submitted: February 14, 2007
Decided: May 2, 2007

Before **STEELE**, Chief Justice, **HOLLAND, BERGER, JACOBS** and **RIDGELY**, Justices, constituting the Court *en Banc*.

Disciplinary Proceeding Upon Final Report of the Board on Professional Responsibility of the Supreme Court. **PUBLIC REPRIMAND IMPOSED**.

Richard L. Abbott, Esquire, Abbott Law Firm, Hockessin, Delaware.

Andrea L. Rocanelli, Esquire, Office of Disciplinary Counsel, Wilmington, Delaware.

***Per Curiam*:**

APPENDIX A

This is an attorney discipline matter involves charges of professional misconduct against Richard L. Abbott, Esquire ("Mr. Abbott" or "Respondent") that were filed by the Office of Disciplinary Counsel ("ODC"). This matter originates from the arguments set forth in the opening and reply briefs filed by Mr. Abbott on behalf of his client, 395 Associates, LLC, in an appeal to the Superior Court from a decision of the New Castle County Board of License, Inspection & Review ("LIRB"). The petition filed by ODC alleges that in those briefs, the Respondent's "written advocacy [was] undignified, discourteous, and degrading to the tribunal, as well as prejudicial to the administration of justice." The petition alleges several separate bases for finding a violation of Rules 3.5(d) and 8.4(d) of the Delaware Lawyer Rules of Professional Conduct ("the Rules of Professional Conduct").[1]

In a Final Report, the Board on Professional Responsibility ("the Board") determined that there was not sufficient evidence to conclude that Mr. Abbott had violated either Rule 3.5(d) or 8.4(d) of the Rules of Professional Conduct. Accordingly, the Board dismissed all of the above claims. The Board stated that, although Respondent's briefs used "unnecessary invective and rhetoric" and were "obnoxious," it could not find clear and convincing evidence of a violation of either Rule 3.5(d) or Rule 8.4(d). The Board noticed, however, "this has been a difficult case....The Respondent has come close to crossing the line with respect to unprofessional litigation conduct because many of the words he chose and the tone of his arguments were unnecessarily sarcastic and strident in tone."

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[1] Rule 3.5(d) states that "A lawyer shall not:...(d) engage in conduct intended to disrupt a tribunal or engage in undignified or discourteous conduct that is degrading to a tribunal."
Rule 8.4(D) states that "It is professional misconduct for a lawyer to:...(d) engage in conduct that is prejudicial to the administration of justice."

The ODC has filed objections to the Board's Final Report and asked this Court to sanction the Respondent for his actions. We have determined that the Respondent's behavior violates both Ruled 3.5(d) and 8.4(d) of the Rules of Professional Conduct and goes beyond being *merely* unprofessional. We also conclude that the appropriate sanction is a public reprimand.

APPENDIX A

Standard of Review

This Court has the "inherent and exclusive authority to discipline members of the Bar."[2] Although recommendations by the Board of Professional Responsibility are helpful, we are not bound by those recommendations.[3] Our role is to review the record independently and determine whether there is substantial evidence to support the Board's factual findings. We review the Board's conclusions of law *de novo*.[4]

Respondent's Conduct

The ODC argues that certain specific acts by the Respondent constituted a violation of the Rules of Professional Conduct. First, the ODC alleges that the Respondent violated these rules by "accusing opposing counsel of fabricating legal grounds for the administrative decision challenged by 395 Associates." Second, the ODC contends that the Respondent also made other improper "inflammatory characterizations in his briefings to the Superior Court." Specifically, the ODC identifies the following statements contained in the Respondent's opening and reply briefs:

- A fictionalized account of the hearing written by lawyers.
- Miraculously, with the aid of legal counsel's imaginative and creative writing skills, the supposed reasoning for the LIRB's decision became dramatically more extensive and well-reasoned.
- Fictional account of the LIRB hearing prepared weeks later.
- The written decision creates an imaginary, make-believe set of reasons for the LIRB's findings.

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[2] *In re: Froelich*, 838 A.2d 1117, 1120 (Del. 2003)(citations omitted).
[3] *Id.*
[4] *Id.* (citations omitted).

- The County cites no legal authority to support its assertion that the LIRB's attorney may fabricate conclusions of the LIRB in the written decision.
- Certainly the County does not believe that the LIRB's attorney truly has the authority to write decisions from cloth.
- Laughably, the County found that the violation was not resolved based on an illogical and irrational dissertation.
- Why would the County want to start making decisions on the merits when it could continue to run 395 into the ground for sport based on whatever whimsical speculation the County could conjure up?
- The county's argument...constitutes pure sophistry.
- "The County's own answering brief provides the legal authority to quickly dispense with this ridiculous argument."
- Never one to miss an opportunity to deny a party the right to a fair and impartial hearing on the merits.
- Otherwise the County would be permitted to appoint a group of monkeys to the LIRB, and simply allow the attorney to interpret the grunts and groans of the ape members and reach whatever conclusion the attorney wished from the documents of record.
- [T]he...Code cannot be magically transmuted.

Third, ODC alleges that the Respondent improperly implied that the Superior Court might rule on a basis other than the merits of the case. In support of this allegation, the ODC relies on the following passage in the Respondent's reply brief:

> This is a typical tactic used by the County, in an effort to prejudice the Court against 395 based on the hope that the Court will decide the matter based upon any potential bias or prejudice that it may have against developer Frank Acierno, rather than on merits.

Accusations Against Counsel/Inflammatory Characterizations

The Respondent's personal attacks against counsel for the County is similar to the conduct discussed in *Cannon v. Cherry Hill Toyota, Inc.*[5] In that case, the United States District court for New Jersey found that the sanctions were warranted for "unduly inflammatory language in [the attorney's] certifications and briefs,"[6] and for "his repeated use of inflammatory language in his personal attacks on Plaintiff and her attorneys."[7] The Court held:

> Use of such language does nothing to assist the Court in deciding the merits of a motion, wastes judicial resources by requiring the Court to wade through the superfluous verbiage to decipher the substance of the motion, does not serve the client's interests well, and generally debases the judicial system and the profession.
>
> The Court is aware that a lawyer has an obligation and a duty to represent his client zealously and with diligence. *See* RPC 1.3. However, "[t]he circumstances of this case...present the unhappy picture of a lawyer who has crossed the boundary of legitimate

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[5] *Cannon v. Cherry Hill Toyota, Inc.*, 190 F.R.D. 147 (D.N.J. 1999).
[6] *Id.* at 161.
[7] *Id.* at 163.

> advocacy into personal recrimination against his adversary."[8]

In this case, we conclude that the Respondent's written statements in his briefs filed with the Superior Court similarly violates Rule 3.5(d).[9] First, the Respondent directly accused a fellow member of the Bar of fabricating the basis of the LIRB's decision. Second, the Respondent engaged in "discourteous conduct that is degrading to a tribunal."

Judicial Bias Allegation

The Respondent's briefs also suggested that the Superior Court might rule on a basis other than the merits of the case. We hold that those "unfounded accusations impugning the integrity" of the tribunal violated Rule 3.5(d). In *Peters v. Pine Meadow Ranch Home Ass'n*,[10] the Supreme Court of Utah struck the attorneys' briefs from the record and awarded fees to opposing counsel because the briefs were "replete with attacks on the integrity of the Court of appeals panel that decided the cases below [and were] unfounded, scandalous, irrelevant to the questions upon which we have granted certiorari, and disrespectful of the judiciary."[11]

In *In re Simon*,[12] the Louisiana Supreme Court sanctioned a lawyer with a six month suspension for the following language:

> Judge Simon (Judge *Ad Hoc*) has committed reversible error in the performance of her duties as Judge *Ad Hoc*. Specifically, Judge

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[8] *Id.* at 161-62 (quoting *Thomason v. Norman E. Leher, P.C.*, 182 F.R.D. 121, 123 (D.N.J. 1998).

[9] *In re Ramunno*, 625 A.2d 249, 250 (Del. 1993). *See also Paramount Commc'ns, Inc. v. QVC Network Inc.*, 637 A.2d at 52. In *Paramount*, we explained that had Mr. Jamail been a member of the Delaware Bar, or had been admitted *pro hac vice*, he would have been subject to sanctions for violating Rule 3.5(c), which is now Rule 3.5(d).

[10] *Peters v. Pine Meadow Ranch Home Ass'n*, 2007 WL 79231 (Utah 2007).

[11] *Id.* at *7.

[12] *In re Simon*, 913 So.2d 816 (La. 2005).

> Simon utilized the wrong standard (subjective) in deciding this issue. *In denying plaintiff's Motion to Disqualify/Recuse Defense Counsel, Judge Simon has violated not only controlling legal authority but the very principals [sic] (honesty and fundamental fairness) upon which our judicial system is based.* Judge Simon's denial undermines the efficacy of our jurisprudence, attorney ethics and judicial canons and *serves no other purpose but to promote public disrepute and distrust of our legal system*. Indeed, Judge Simon's denial of plaintiff's motion is *baseless and legally, logically and ethically unsound.*[13]

In *In re Wilkins,*[14] the Indiana Supreme Court found the following statement, contained in a brief to the court clearly impugned the integrity of a judge in violation of the Rules of Professional Conduct and were worthy of sanction. The lawyer wrote that, "[t]he [Court of Appeals] Opinion is so *factually and legally inaccurate* that one is left to wonder whether the Court of Appeals was *determined to find for Appellee* Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision)."[15] In that case, the Indiana Supreme Court decided that public reprimand was considered the appropriate sanction in light of several mitigating factors, including the immediate contact and written apology of the attorney, an outstanding and exemplary record, and the fact that the offending language was actually written by out of state co-counsel.

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[13] *Id.* at 819 (emphasis added).
[14] *In re Wilkins*, 782 N.E.2d 985, 986 (Ind. 2003).
[15] *Id.* at 986 (emphasis added).

Judicial Resources Wasted

The Respondent's conduct also violated Rule 8.4(d) because it was prejudicial to the administration of justice. The Superior Court, in response to the Respondent's use of offensive and sarcastic language, was required to strike *sua sponte* portions of the Respondent's written arguments and to write an opinion explaining her actions.[16] Thus, the Respondent caused a waste of judicial resources that otherwise would be devoted to the merits of other cases before the Superior Court. This Court has previously held that disruptive conduct was prejudicial to the administration of justice.[17]

Delaware Attorneys' Oath

The Respondent, like so many before him and so many since, took the following oath upon his admission to the Delaware Bar in 1989:

> "I, .., do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of Delaware; that I will behave myself in the office of an Attorney within the Courts according to the best of my learning and ability and with all good fidelity as well to the Court as to the client; that I will use no falsehood nor delay any person's cause through lucre or malice."[18]

This oath is, in its essential language, the same one taken by Delaware lawyer since colonial days. When the very first Delaware lawyer, Thomas Spry, was admitted to the Bar in

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[16] *395 Assocs., LLC v. New Castle County*, 2005 WL 3194566, at *1 (Del. Super.).

[17] *See In re Shearin*, 765 A.2d 930, 939 (Del. 2000) (holding that the filing of a lawsuit in contradiction to a court order was prejudicial to the administration of justice); *Matter of Mekler*, 669 A.2d 655, 667 (Del. 1995) (holding that disruptive conduct that wastes judicial resources can constitute a violation of Rule 8.4(d)).

[18] Supr. Ct. R. 54.

1676, his behavior was of paramount importance. Court records reflect the following:

> Upon the petition of Thomas Spry desiring that he might be admitted to plead some people's cases in the court, etc.
>
> The worshipful Court have granted him leave so long as the Petitioner Behaves himself well and Carry's himself answerable thereunto.[19]

Thus, the ideal that a Delaware lawyer will "behave...in the office of any Attorney" is a first principle of the Delaware Bar that dates back a hundred years before the Revolutionary War. Today, that principle remains a fundamental tenet of the American legal profession. As former Chief Justice of the United States, Warren E. Burger, stated: "lawyers who know how to think but have not learned how to behave are a menace and a liability not an asset to the administration of justice...I suggest the necessity for civility is relevant to lawyers because they are the living exemplars-and thus teachers-everyday in every case and in every court; and their worst conduct will be emulated...more readily than their best."[20]

Zealousness Within Boundaries

All members of the Delaware Bar are officers of the Court. Although a lawyer has a duty to his or her client, each Delaware lawyer has sworn an oath to practice "with all good fidelity as well to the Court as to the client." This responsibility to the "Court" takes precedence over the interests of the client because officers of the Court are

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[19] Randy J. Holland, *Introduction* to *The Delaware Bar in the Twentieth Century* xxi (Helen L. Winslow, et al. eds., 1994).

[20] D. Hubert, "Competence, Ethics and Civility as the Core of Professionalism: The Role of Bar Associations and the Special Problems of Small Firms and Solo Practitioners," Teaching and Learning Professionalism Symposium proceedings, American Bar Association (1996), at 113 (quoting, Address by Justice Warren E. Burger to the American Law Institute (reported in the National Observer (May 24, 19971)).

obligated to represent these clients zealously *within* the bounds of both the positive law and the rules of ethics.[21]

As "officers of the court," lawyers are an integral part of the institutional administration of justice. Adherence to the rule of law keeps America free. Public respect for the rule of law requires the public's trust and confidence that our legal system is administered fairly not only by judges but also by "officers of the court."

Civil behavior towards the tribunal and opposing counsel does not compromise an attorney's efforts to diligently and zealously represent his or her clients.[22] "Indeed, it is a mark of professionalism, not weakness, for a lawyer zealously and firmly to protect and pursue a client's legitimate interests by a professional, courteous, and civil attitude toward all persons involved in the litigation process."[23] This Court has frequently quoted the following remarks of Justice Sandra Day O'Connor:

> I believe that the justice system cannot function effectively when the professionals charged with administering it cannot even be polite to one another. Stress and frustration drive down productivity and make the process more time-consuming and expensive. Many of the best people get driven away from the field. The profession and the system itself lose esteem in the public's eyes.
>
> * * * * * *
>
> In my view, incivility disserves the client because it wastes time and energy-time that is billed to the client at hundreds of dollars an

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[21] *Nix v. Whiteside*, 475 U.S. 157, 168 (1986). *See also* Sandra Day O'Connor, *Professionalism*, 78 Or. L. Rev. 385, 387 (1999).

[22] *See* Sandra Day O'Connor, *Professionalism*, 78 Or. L. Rev. 385, 387 (1999).

[23] *Paramount Commc'ns, Inc. v QVC Network Inc.*, 637 A.2d 34, 54 (Del. 1994).

> hour, and energy that is better spent working on the case than working over the opponent.[24]

Justice Brent Dickson of the Indiana Supreme Court has appropriately observed that civil law is not an oxymoron.[25]

In this case, the Board struggled with where to draw the line between conduct that was *merely* unprofessional and conduct that was unethical. As a result, the Board found that although the Respondent's briefs were "obnoxious" and used "unnecessary invective and rhetoric," there were no ethical violations. In this regard, the New Jersey Supreme Court's decision in *In re Vinceti*[26] is instructive:

> Under some circumstances it might be difficult to determine precisely the point at which forceful, aggressive trial advocacy crosses the line into the forbidden territory of an ethical violation. But no matter where in the spectrum of courtroom behavior we would draw that line, no matter how indulgent our view of acceptable professional conduct might be, it is inconceivable that the instances of respondent's demeanor that we are called upon to review in these proceedings could ever be countenanced.[27]

As this Court stated more than fifteen years ago, "[s]imply put, insulting conduct toward opposing counsel, and disparaging a court's integrity are unacceptable to any standard."[28]

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[24] *See Kaung v. Cole Nat. Corp.* 884 A.2d 500, 508 (Del. 2005). (*citing Paramount Commc'ns, Inc. v. QVC Network Inc.*, 637 A.2d 34, 51 n.24 (Del. 1994)) (quoting Justice Sandra Day O'Connor, Remarks to an American Bar Association Group on "Civil Justice Improvements" (Dec. 14, 1993)).

[25] *See* Brent E. Dickson and Julia Buntun Jackson, *Renewing Lawyer Civility*, 28 Val. U. L. Rev. 531 (1994).

[26] *In re Vincenti*, 458 A.2d 1268 (N.J. 1983).

[27] *Id.*

[28] *In re Ramunno*, 625 A.2d 249, 250 (Del. 1993).

Zealous advocacy never requires disruptive, disrespectful, degrading and disparaging rhetoric. The use of such rhetoric crosses the line from acceptable forceful advocacy into unethical conduct that violates the Delaware Lawyer's Rules of Profession Conduct. "Lawyers are not free, like loose cannons, to fire at will upon any target of opportunity which appears on the legal landscape. The practice of law is not and cannot be a free fire zone."[29]

The leading treatise on legal ethics states that "Part 3 of the Model Rules stands as a stern reminder that it is simply not the case that 'anything goes' once a matter reaches a courtroom or other tribunal; even hardball is played according to an exacting set of rules."[30] During his confirmation hearing, the Chief Justice of the United States, John G. Roberts, Jr., also used a baseball analogy: "Judges are like umpires. Umpires don't make the rules; they apply them. The role of an umpire is critical. They make sure everybody plays the rules."[31] Like umpires, judges must decide which hits by an advocate are fair and which hard hits by an advocate are foul. In this case, the hits in the briefs filed by the Respondent were not only foul but were so far beyond the boundaries of propriety that they were unethical.

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[29] *Cannon v. Cherry Hill Toyota, Inc.*, 190 F.R.D. 147, 162 (D.N.J. 1999).

[30] 2 Hazard & Hodes, *The Law of Lawyering* (3d ed.2007 supp) The Lawyer as Advocate, § 26.3, pp. 26-6 (Aspen Law & Business).

[31] Transcript of Confirmation Hearing of Chief Justice Roberts (September 12, 2005), available at http://www.asksam.com/ebooks/JohnRoberts/ confirmation_hearing.asp.

Conclusion

We hold that the appropriate sanction for the Respondent in this matter is a public reprimand. The issuance of this opinion will constitute that action.

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN THE MATTER OF A MEMBER OF THE BAR OF THE SUPREME COURT OF THE STATE OF DELAWARE:	§	No. 676, 2006
	§	Board Case No. 8, 2006
	§	
RICHARD L. ABBOTT,	§	
Respondent.	§	

Submitted: May 9, 2007
Decided: May 15, 2007

Before **STEELE**, Chief Justice, **HOLLAND, BERGER, JACOBS** and **RIDGELY**, Justices, constituting the Court *en Banc*.

***Per Curiam*:**

The Court has carefully considered the Respondent's Motion for Reargument and concluded that it is without merit. Accordingly, it is hereby ordered that the Motion for Reargument is denied.

BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF DELAWARE

IN THE MATTER OF A MEMBER OF THE BAR OF THE SUPREME COURT OF DELAWARE: RICHARD L. ABBOTT, RESPONDENT.	:	CONFIDENTIAL Board Case No. 8, 2006

RESPONSE TO PETITION FOR DISCIPLINE

Respondent Richard L. Abbott ("Abbott") hereby responds to the Petition For Discipline dated July 12, 2006 filed by the Office of Disciplinary Counsel ("ODC"). As set forth in further detail below, Abbott submits that no violation of Rules 3.5(d) and 8.4(d) of the Delaware Lawyers Rules of Professional Conduct ("Rules") occurred. In support of his response in opposition, Abbott represents the following:

1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. Denied.

7. Denied.

8. Denied that comments from a brief can be taken out of context and misrepresented in the fashion presented in the Petition. It is further denied that telling the truth and pointing out relevant issues in an opposing party's case is "inflammatory," nor for that matter that inflammatory matters constitute a violation of the Rules. It is also denied that there was any implication that the Superior Court might rule on the basis of bias or prejudice; the brief clearly states that Abbott was confident that the Court would rule based on the merits.

9. Admitted that allegations are based upon the subjective opinion of one Judge who relied upon mischaracterizations of the brief contents, the non-binding Delaware Principles of Professionalism for Delaware Lawyers and other non-mandatory sources, factually distinguishable case citations, and a conclusory and unsupported assertion that a Rule 3.5(d) violation may have

occurred. It is also admitted that despite disagreeing with the Order of the Court, Abbott appropriately abided by the Court's Order and promptly filed an Amended Reply Brief so as to eliminate the subjective concerns raised by the Judge. Finally, it is admitted that the Judge forwarded a complaint to the Office of Disciplinary Council requesting an investigation of the matter. Otherwise, denied.

10. It is admitted that the Interim Order contains the subjective opinion of one Judge based on: 1) no decisional law on point; 2) speeches and other source materials and the non-binding Principles of Professionalism for Delaware Lawyers; and 3) mischaracterizations of the contents of the Reply Brief. It is further admitted that the Interim Order constitutes one Judge's subjective opinion of professional civility, which has absolutely no factual or legal bearing on whether any violation of the Rules occurred. Finally, it is admitted that the subjective concerns of the Judge were resolved pursuant to a promptly filed Amended Reply Brief in accordance with the Court's Order.

11. Admitted.

12. It is admitted that Rule 3.5(d) states that "[a] lawyer shall not: engage in conduct intended to disrupt a tribunal or engage in undignified or discourteous conduct that is degrading to a tribunal." Otherwise, denied.

13. Denied.

14. Admitted that Rule 8.4(d) is a "catchall" provision that states "[i]t is professional misconduct for a lawyer to: engage in conduct that is prejudicial to the administration of justice." Otherwise, denied.

15. Denied.

16. Denied.

AFFIRMATIVE DEFENSES

17. The Petition should be dismissed for lack of subject matter jurisdiction since: 1) it is not based upon any applicable provisions of the Rules; and 2) disciplinary proceedings may not be pursued based upon alleged violations of the non-binding Principles of Professionalism for Delaware Lawyers ("Principles").

18. The Petition fails to state a claim upon which relief can be granted; there are not adequate allegations sufficient to meet the clear and convincing evidence standard with respect to: 1) the element of specific intent required by the first clause of Rule 3.5(d); 2) the element of conduct directed at the Judge required by the second clause of Rule 3.5(d); 3) any conduct proscribed by Rule 3.4, which is the sole Rule regulating attorney actions toward opposing parties and counsel; 4) conduct occurring prior to, during, or immediately after a court proceeding as required by Rule 3.5(d): 5) allegations beyond the subjective opinion of one Judge with respect to professionalism and civility under the non-binding Principles and related non-mandatory source materials; 6) the brief excerpts going beyond legitimate advocacy, as required by Rule 8.4(d), Comment [3]; 7) any support for the theory that the brief commentary was not substantially true – *i.e.* truth is an absolute defense; and 8) any decisional authority supporting the novel and otherwise legally unsupported theory that brief language

which is not vulgar, contumacious, or discriminatory can constitute a violation of Rules 3.5(d) or 8.4(d).

19. The Petition fails to state the standard for Delaware lawyers required to establish a violation of Rule 3.5(d) and Rule 8.4(d), or that Abbott violated that standard, and it is therefore insufficient to state a claim as a matter of law.

20. The claims in the Petition are barred by the principle of acquiescence.

21. The claims in the Petition are barred based upon the prohibition against selective prosecution.

22. The claims in the Petition are barred based upon the fundamental right to Freedom of Speech guaranteed pursuant to the 1st Amendment to the United States Constitution and Article I, § 5 of the Delaware Constitution.

23. The claims in the Petition are barred based upon the failure to state which facts purportedly establish violations of which Rules therefore failing to adequately apprise Abbott of the charges which he is being asked to

answer to in violation of his fundamental right to Due Process under the 14th Amendment to the United States Constitution and Article I, §§ 7 and 9 of the Delaware Constitution.

24. The claims in the Petition are barred on the grounds that the ODC proceeded in contravention of the Delaware Lawyers' Rules of Disciplinary Procedure, thereby depriving Abbott of important Due Process rights guaranteed to him by the 14th Amendment to the United States Constitution, and Article I, §§ 7 and 9 of the Delaware Constitution.

25. The claims in the Petition are barred based upon the failure of Rules 3.5(d) and 8.4(d) to provide adequate notice that merely critical and tough comments toward opposing party and counsel, which is not prohibited by the Rule expressly regulating conduct toward opposing parties and counsel (Rule 3.4), could also be governed by other rules that do not squarely address such conduct, in violation of fundamental Due Process protections guaranteed

by the 14th Amendment to the United States Constitution and Article I, §§ 7 and 9 of the Delaware Constitution.

WHEREFORE, Respondent Richard L. Abbott respectfully requests that the Board dismiss the allegations brought against him as being unfounded in both fact and law.

/s/ Richard L. Abbott, Esquire
Richard L. Abbott, Esquire
(#2712)
724 Yorklyn Road, Suite 240
Hockessin, DE 19707
(302) 489-2529

Dated: July 28, 2006

CERTIFICATE OF SERVICE

I, Richard L. Abbott, Esquire, hereby certify that on this 28th day of July, 2006, I had two (2) copies of the foregoing **Response To Petition For Discipline** served on the below-listed individuals as indicated:

VIA HAND DELIVERY

Andrea L. Rocanelli, Esquire
Office of Disciplinary Counsel
Supreme Court of the State of Delaware
Carvel State Office Building
820 North French Street, 11th Floor
Wilmington, DE 19801

/s/ Richard L. Abbott, Esquire
Richard L. Abbott, Esquire
(#2712)

BOARD ON PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF DELAWARE

IN THE MATTER OF A MEMBER OF THE BAR OF THE SUPREME COURT OF DELAWARE: RICHARD L. ABBOTT, RESPONDENT.	:	**CONFIDENTIAL** Board Case No. 8, 2006

RESPONDENT'S ANSWERING MEMORANDUM IN SUPPORT OF DISMISSAL OF ALLEGATIONS

I. Introduction

This matter was commenced almost exactly one (1) year ago by the Office of Disciplinary Counsel ("ODC"). After a protracted period during which the ODC changed its position numerous times on what it would be investigating and later on what charges it would be proceeding with against Respondent Richard L. Abbott ("Abbott"), the matter was finally brought before the Board On Professional Responsibility ("Board") for hearing on September 13, 2006.

A. The Motion To Dismiss Process

Before the Board's September 13, 2006 hearing, however, motion practice was conducted before the Chair of the Board with respect to Abbott's July 28, 2006 Motion To Dismiss.[1] In the Motion To Dismiss, a request was made to dismiss the matter in its entirety based upon the Board's lack of subject matter jurisdiction and the failure of the ODC to adequately set forth allegations sufficient to state a purported

[1] A Motion To Dismiss Amended Petition was filed on September 19, 2006 based upon the Order of the Board Chair at the September 13th hearing, but the arguments are virtually identical to those contained in the initial Motion To Dismiss. Therefore, for purposes of this Memorandum, references to "Motion To Dismiss" are to the Motion To Dismiss Amended Petition.

violation. The thrust of the argument regarding lack of subject matter jurisdiction was that the ODC was alleging unprofessional comments which could only rise to the level of a violation of the non-binding Principles of Professionalism for Delaware Lawyers ("Principles") and because Rule 3.4 of the Delaware Lawyers Rules of Professional Conduct ("DLRPC") on "Fairness To Opposing Party And Counsel" prohibited an allegation of violation of the general catchall rules asserted by the ODC based upon the principle of preemption.

The failure to state a claim argument contained in the Motion To Dismiss first alleged that no allegation of specific intent necessary to establish a DLRPC Rule 3.5(d) violation regarding "conduct intended to disrupt a tribunal" was stated.[2] The Motion To Dismiss also alleged that the DLRPC Rule 3.5(d) averment of "undignified or discourteous conduct that is degrading to a tribunal" did not state a claim since: 1) no allegation of conduct directed toward the Superior Court Judge was made; 2) the Petition at best alleged "undignified or discourteous conduct that is degrading to the opposing party or counsel"; 3) contents of a Brief footnote meant directly the opposite of the ODC's alleged reading that the "Court might rule on the basis of bias or prejudice...rather than on the merits of the action..."; 4) the Brief excerpts did not adequately state "undignified or discourteous" conduct since it requires statements of profanity, vulgarity, contumaciousness, racial or religious prejudice, unfounded assertions of judicial impropriety, inappropriate sexual commentary, attacks on judicial integrity, retorts which harshly attack court rulings, or attorney intoxication in front of a judge.

Additionally, the Motion to Dismiss pointed out that Comment [3] to Rule 8.4 states that a violation cannot be asserted under that rule if it involves "legitimate advocacy"

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[2] The ODC finally admitted the inadequacy of this allegation at the September 13, 2006 Board hearing, and agreed that that portion of the Amended Petition should be dismissed. Trans. at 109.

which does not otherwise constitute words or conduct of "bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status." Further, the Motion To Dismiss argued that the Petition did not contain facts adequate to establish a violation based upon the heightened "Clear and Convincing Evidence" standard applicable in the proceeding. Finally, the Motion To Dismiss cited the fact that specific words that the ODC alleged to be violations of the DLRPC were in fact used on occasion by Judges in written decisions, thereby eliminating the possibility that they could be deemed inappropriate (*i.e.* they are regularly utilized, professional, and appropriate comments where circumstances warrant).

Abbott also filed a Reply In Support of the Motion To Dismiss. The Reply addressed the fact that: 1) the charges alleged were not "clear and specific" as required by Rule 9(d)(1) of the Delaware Lawyers Rule of Disciplinary Procedure ("DLRDP); 2) the Petition expressly notes that the allegations "included, but were not limited to" certain examples; 3) cases cited in support of the Rule 3.5(d) and Rule 8.4(d) charges were distinguishable; 4) the ODC's failure to explain how certain words alleged to be unethical can be so when they are regularly utilized by members of the Delaware Judiciary; 5) the ODC completely misrepresents the contents of the Brief with respect to an analogy and a footnote; and 6) comments by Abbott were appropriate given the Superior Court's conclusion that the LIRB's decision was largely unfounded as both a matter of fact and law.

The Motion To Dismiss was presented to the Chair of the Board at an oral argument teleconference conducted on Friday, September 1, 2006. Abbott's Motion To Dismiss was denied by the Board Chair after a telephonic oral argument was conducted on September 7, 2006. The precise reasoning for denial cannot be provided since a transcript of that teleconference has not been received, but members of the Board are referred to that transcript (assuming one has been prepared) for further reference as to the justification for

denial. Upon information and belief, the basis for denial was simply limited to a ruling that the matter should proceed to a hearing for presentation of all the evidence, without any express explanation of a specific legal rationale for rejection of the multiple and discrete arguments upon which the Motion To Dismiss was founded.

At the Board hearing, Abbott renewed the Motion to Dismiss and also moved for judgment as a matter of law at the close of the ODC's case and at the close of his case. Trans. at 18-24 and 110. The Board denied the motions at the close of the ODC's case. Trans. at 24. And no ruling was rendered on the motions at the end of the case. Trans. at 110.

B. The Standard Of Proof: Clear And Convincing Evidence; Requires Establishment Of Violations To A High Degree Of Probability.

1. The ODC Has Failed To Meet Its Burden And It Admits It

The ODC bears the burden of proof in this matter based upon the standard requiring a showing of any violation(s) by "clear and convincing evidence." DLRDP Rule 15(d). Clear and convincing evidence has been defined as evidence which produces an "abiding conviction" that the truth of the matter is highly probable. *Hudak v. Procek*, 806 A.2d 140, 147 (Del. 2002). It has also been defined as evidence which proves "something that is highly probable, reasonably certain, and free from serious doubt." *Id.* Therefore, an evaluation of the allegations must be made in light of the requirement that they state violations of Rules 3.5(d) and 8.4(d) to a high degree of probability.

Clear and convincing evidence must be distinguished from the lower standard of proof which is more generally applicable in civil proceedings in the Delaware court system: proof by a preponderance of the evidence. Proof by a preponderance of the evidence has been described, in pertinent part, by the Superior Court Pattern Jury Instructions as follows:

> Proof by a preponderance of the evidence means proof that something is more likely than not. It means that certain evidence, when compared to the evidence opposed to it, has the more convincing force and makes you believe that something is more likely true than not. Preponderance of the evidence does not depend on the number of witnesses. If the evidence on any particular point is evenly balanced, the party having the burden of proof has not proved that point by a preponderance of the evidence, and you must find against the party on that point.

Based upon the clear and convincing evidence standard, the Board may not find that a violation occurred even if it should conclude that it is slightly more likely than not that the charges are supported by the evidence. To use the analogy relied upon by the ODC, if the color white stood for no violation, and the color black stood for a clear violation, the clear and convincing evidence standard would require the ODC to prove the allegations sufficiently for the Board to conclude that the ODC's case was charcoal black. *See* Opening Memo at 2. Contrary to the ODC's assertion, proof of its case to the level of "gray" under that analogy does not suffice. Indeed, gray, which would indicate halfway between white and black, would not even satisfy the preponderance of the evidence standard. Consequently, the ODC has admitted from the outset of its Opening Memo that the charges alleged are murky and uncertain and that it has not satisfied the clear and convincing evidence standard.[3]

C. Three (3) Years Ago An Updated Version Of The Principles Was Published.

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[3] Based on this admission alone, the Board may stop, find the ODC's comments to constitute an admission, and render a recommendation that the charges be dismissed based upon the ODC's confession to a failure of proof.

The Principles expressly provide that they shall not constitute a basis for lawyer discipline or sanctions. Ex. 16. Instead, they are suggested plauditory goals. Some of the specific aspirational goals which the Principles hope to strive for are:

1. Treating others with respect.
2. Treating adverse counsel and parties fairly and equitably.
3. Exercising Civility, meaning: a) exhibiting respect for colleagues and others encountered in practice; b) avoiding verbal intemperance and personal attacks; and c) avoiding scorn and superiority in words. Ex. 16 at A.1., 2., and 4.

In addition, the Principles set forth certain objectives regarding how a lawyer should write in communications and papers filed with the Court. Ex. 16 at B.3. No such similar provisions are contained in the mandatory, binding provisions of the DLRPC. As a consequence, it is clear that matters addressing treatment of opposing parties and counsel and the professional propriety of written matters filed with the Court are not, and may not be, grounds for any disciplinary action or sanction.

II. Facts

A. Complete Excerpts Of Briefs, Providing Context For Consideration Of The Limited Ellipsized Quotations Contained In The Petition[4]

1. Petition Paragraph 8(a)(i) (395's Opening Brief):

This *Certiorari* action was initiated pursuant to the filing of a Complaint *In Certiorari* on January 26, 2005. The action seeks review on appeal of an administrative decision rendered by the New Castle County Department of Land Use

[4] The language upon which the ODC relies is highlighted within the Brief excerpts restated.

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and an appellate decision issued by the New Castle County Board of License, Inspection & Review ("LIRB").

The two (2) decisions on appeal to this Court are specifically: 1) a Rule To Show Cause Decision dated July 13, 2004 issued by the New Castle County Code Official based upon a hearing conducted on January 30, 2004; and 2) a decision rendered by the LIRB at a hearing conducted on December 14, 2004, as attempted to be modified pursuant to a fictional account of the hearing written by lawyers on behalf of the LIRB dated December 30, 2004.

After the case was filed, the Court issued a *Writ of Certiorari* to the Defendants in this action, commanding them to hand-up to the Court the record and transcript of the proceedings conducted below in the administrative hearing and the administrative appellate processes. The record was submitted by the Defendants to this Court on March 8, 2005.

The Court issued a briefing schedule in this action on March 10, 2005. On March 29, 2005, the parties filed a Stipulated Briefing Schedule to modify the schedule originally imposed by the Prothonotary. This is Plaintiff's Opening Brief on appeal in this *Certiorari* proceeding.

2. Petition Paragraph 8(a)(ii) (395's Opening Brief):

At the conclusion of the hearing, the LIRB voted three (3) "yes" and one (1) not voting in favor of a motion to deny 395's appeal. *See* Exhibit D at pp. 65-67. The abstention vote was made by Board member Robert Juhrden on the basis that he believed two (2) of the charges alleged by the County were barred by the applicable three (3) year statute of limitations prior to the issuance of the Violation Notices. *Id.* at 64-66. The Chairman of the Board, Joseph Maloney, voted to deny the appeal on the grounds that he believed all work had to be completed in a workmanlike manner or it automatically constituted a violation of the Building Code in his opinion, and that he saw no way that the County acted arbitrarily or capriciously. *Id.* at 65. Nowhere did Maloney indicate whether he found there to have been an error of law on the part of the County, nor whether any charges were barred by the applicable three (3) year statute of limitations. *Id.*

Additionally, LIRB member Mark Weinberg found the County's action were perfectly reasonable, that based on his subjective expectations as a private citizen a violation of the County Building Code occurred with respect to the handrail issue, and that if any water was coming inside of a window years after it was sold by a home builder that in his subjective opinion that would automatically constitute a violation of the Building Code. *Id.* at 62-63. Finally, LIRB member John Bonvetti, himself a home builder, concluded that the County did not act arbitrarily or capriciously in their actions, that the statute of limitations should not bar the fixing of leaky windows, that 395 should finish coat the handrail regardless of whether it constitutes a Building Code violation. *Id.* at 63-64. Bonvetti failed to render any finding on the grading/drainage issue or 395's challenge that the County had committed an error of law. *Id.*

A few weeks later on December 30, 2004, the LIRB's legal counsel issued a written decision formally denying 395's appeal. *See* Exhibit J. Miraculously, with the aid of legal counsel's imaginative and creative writing skills, the supposed reasoning for the LIRB's decision became dramatically more extensive and well-reasoned. *Id.* Rather than the largely conclusory, unsupported, difficult to understand, and sometimes nonsensical bases stated on the record at the hearing by the LIRB majority voting to deny 395's appeal, the written decision purports to present a more cogent and sensical basis for the LIRB's conclusions. *Id.* Unfortunately, these matters cannot change the facts that were in existence at the time of the Board's actual denial of the appeal, and therefore the Court should ignore the written decision to the extent that it differs with the transcript of the LIRB hearing.

3. Petition Paragraph 8(a)(iii) and (iv) (395's Opening Brief):

B. The LIRB Proceeded Irregularly Since None Of The Three (3) Member Majority Voting To Deny The Appeal Applied The Correct Legal Standard Under The County Code.

LIRB Chairman Joseph Maloney rendered a decision at the December 14, 2004 hearing finding only that the County did not act arbitrarily or capriciously. *See* Exhibit D at p. 65. The same conclusion was reached by LIRB member John Bonvetti. *Id.* at 63. LIRB member Robert Juhrden abstained from the vote. *Id.* at 66. And LIRB Member Mark Weinberg did not indicate his findings under either of the two (2) standards of review that the LIRB is obligated to analyze and base their decision on. Consequently, the LIRB did not render a decision on 395's appeal based upon the "error of law" standard dictated by the County Code.

In spite of the total lack of any record evidence of LIRB findings with respect to the "error of law" standard of

review, the written decision prepared by the LIRB's attorney alleges that the LIRB concluded that the decision appealed from "was not arbitrary or capricious, nor was it contrary to law." *See* Exhibit J at p.5. The written decision, however, was only signed by the LIRB's Chairman, so that a majority of the Board did not even sign off on the fictional account of the LIRB hearing prepared weeks later. *See Id.* at p. 6. More importantly, however, neither the LIRB attorney nor its Chairman may render a written decision which is contradictory to the record made at the LIRB hearing on December 14, 2004. *See* Exhibit L at p.4.

The LIRB has promulgated certain Rules of Procedure. *See* Exhibit L. Article V, § 7 of the LIRB's rules provides that the LIRB may "render its decision at the close of the public hearing on a particular application." *Id.* at p. 4. Indeed, the LIRB did exactly that at the appeal hearing on 395's application for reversal of the Code Official's July 12, 2004 decision. The LIRB's Rules further provide that it "shall make findings of fact and render a decision in writing based upon the record created at the public hearing... ." *Id.* (emphasis added). This the LIRB utterly failed to do; the written decision instead creates an imaginary, make-believe set of reasons for the LIRB's findings. The written decision is therefore legally invalid under the LIRB's rules since it is not supported by the verbatim transcript record of the hearing.

The County will undoubtedly argue that administrative Boards and Commissions frequently produce written decisions that may be at variance with the verbal decision-making rendered at a public hearing. Regardless of that "practice," however, the LIRB is bound by the very rules that it has chosen to impose upon itself. The LIRB has clearly and unambiguously stated that the written decision regarding hearings that it conducts must, without exception, comport with the record of its decision-making rendered at the hearing. Consequently, any matters contained in the written decision which are at variance with the record of

proceedings conducted by the LIRB must be ignored by the Court for purposes of this *Certiorari* appeal.

It is undisputed and indisputable that the record reflects a lack of majority decision with respect to the necessary "error of law" standard of review regarding 395's appeal. The Courts of this State have clearly established that one of the fundamental prerequisites of an administrative decision under the Due Process clause of the United States and Delaware Constitutions is the reliance by a government body upon the correct legal standards. *County Council of Sussex County v. Green*, 516 A.2d 480 (Del. 1986) ("Only when the administrative process affords these fundamental protections will the result receive judicial deference."). The LIRB's failure to base its decision on both of the two (2) necessary standards of review dictated by the New Castle County Code means that it proceeded irregularly. Therefore, the Court must reverse the LIRB's decision and remand it for further proceedings in order to properly consider 395's appeal.

4. Petition Paragraph 8(b)(i) and (ii) (395's Reply Brief):

Another example of the unfounded nature of the County's findings with respect to the charges alleged is reflected in the Rule To Show Cause Decision's conclusion regarding the grading/drainage issue. The decision notes that 395 submitted a new lines and grade pans, obtained County approval of it, and subsequently implemented it by re-grading the site. *See* Exhibit I to Opening Brief at p.3. It also notes that 395 "provided the Department with a letter dated November 6, 2002 from the consulting engineer, Gejza Csoltko, P. E. indicating that they had performed two (2) inspections on the property and that the property conformed to the approved lines and grades plan." *Id.* But this well-founded evidence of correction of the prior violation was not good enough for the County. Laughably, the County found that the violation was not resolved based upon an illogical and irrational dissertation, as follows:

> Mr. Permelia testified that visually the area at the corner of the building next to the garage may have enough slope to meet code; however, there was a significant amount of ponding in this area. Because we do not have appropriate instrumentation to determine the elevation where the property was ponding, he indicated that he could not give an accurate opinion as to the cause of the problem.

The County's witness admitted "he could not give an accurate opinion"! But that did not stop the hearing officer from finding against 395. Why would the County want to start making decisions on the merits when it could continue to run 395 into the ground for sport based upon whatever whimsical speculation the County could conjure up? To describe such irresponsible government conduct as arbitrary would be charitable.

5. Petition Paragraph 8(b)(iii), (iv) and (v) (395's Reply Brief):

I. THE COUNTY'S ARGUMENT THAT 395'S TIMELY APPEAL IS UNTIMELY CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL AND IN ANY EVENT CONSTITUTES PURE SOPHISTRY

Never one to miss an opportunity to deny a party the right to a fair and impartial hearing on the merits, the County outdoes itself once again raising for the first time on appeal that 395 is barred from appealing the timely appealed Rule To Show Cause decision and LIRB decision on the grounds that 395 did not appeal a July 8, 2002 Rule To Show Cause decision. Answering Brief at 10. The County's own Answering Brief provides the legal authority to quickly dispense with this ridiculous argument.

The County concedes that a common law *Certiorari* appeal is considered "on the record." Answering Brief at 9. Indeed, the County admits that the Court's review for errors of law, irregularity in the proceedings, and jurisdictional review are limited to the record below. *Id.* at 9-10. The County never raised the issue of the failure of 395 to appeal the July 8, 2002 Rule To Show Cause decision in the administrative hearing and appeal process. Therefore, the issue was never decided by the LIRB. *See* Exhibit J to Opening Brief. Consequently, the County's newly asserted argument may not be considered by the Court since there is nothing in the "record" from the LIRB hearing which is currently before this Court to render a decision upon.

The County's argument also lacks merit even assuming the Court were to consider it. It is undisputed that the County notified 395 of its intent to prosecute charges against 395 at a Rule To Show Cause hearing to be held on January 30, 2004 based upon the Violation Notices issued in April, May and July of 2002. 395 defended against those charges at the Rule To Show Cause hearing and thereafter appealed the Rule To Show Cause decision arising therefrom to the LIRB. The County is the one that made the decision not to issue new Violation Notices which reflected the changes in circumstances which arose between the April/July, 2002 time period and 2003 when the Rule To Show Cause hearing was set up. Therefore, both the Rule To Show Cause hearing on appeal before this Court, as well as the appeal to the LIRB thereafter, constitute completely new and timely appealed issues.

6. Petition Paragraph 8(a)(v) (395's Opening Brief) and (vi) and 8(b)(vi) (395's Reply Brief):

II. THE LIRB DID PROCEED IRREGULARLY BY FAILING TO RENDER A DECISION BASED UPON THE REQUIRED STANDARDS OF REVIEW

A. The LIRB Did Not Evaluate 395's Appeal Under The Applicable Legal Standards

In attempting to rebut 395's argument that a majority of the LIRB failed to apply the "error of law" standard of review, the County asserts that the record reflects otherwise. Answering Brief at 11-14. In addition, the County contends that: 1) LIRB members cannot be expected to actually apply the correct legal standard; and 2) it is legally permissible for a written opinion to be a wholesale manufacturing of new grounds to support a Board's oral ruling. *Id.* All three (3) of the County's arguments are unavailing.

The County cites only one (1) passage from the LIRB hearing record in support of its contention that the LIRB members addressed the error of law standard: the LIRB Chairman's statement prior to discussion by LIRB members of whether they found "the Department or the County's actions arbitrary or capricious or that they were taken not pursuant to law." *See* Answering Brief at 12. What the County misses, however, is that no Board vote was taken directly after this query was stated by the LIRB Chairman. The County does not in any way rebut 395's assertions that: 1) two (2) LIRB members rendered only a finding on the "arbitrary or capricious" standard; 2) one (1) member did not indicate his findings under either of the two (2) standards of review; and 3) a fourth member abstained. *See* Opening Brief at 9. Consequently, it is undisputed that the majority of the Board did not orally rule with respect to the error of law standard of review which the County Building Code requires. *See* County Code § 6.09.003E. (the LIRB must decide "if the action taken was not arbitrary or capricious or was not taken pursuant to law.").

It should also be noted that the LIRB failed to muster a majority ruling on the "arbitrary or capricious" standard of review. Only three (3) members voted. Of those, only two (2) pronounced their determination based upon the "arbitrary or capricious" standard. As a result, the LIRB Decision must also be reversed based upon the failure of a majority of LIRB members to render any decision under the "arbitrary or capricious" standard of review.

B. The LIRB's Attorney Cannot Create A Record Out Of Thin Air

The County cites no legal authority to support its assertion that the LIRB's attorney may fabricate conclusions of the LIRB in the written decision. *See* Answering Brief at 12-13. Just because the LIRB is a citizen board does not mean that its members are given license to ignore the legal standards which govern their decisions. Otherwise the County would be permitted to appoint a group of monkeys to the LIRB, and simply allow the attorney to interpret the grunts and groans of the ape members and reach whatever conclusion the attorney wished from the documents of record. Certainly the County does not believe that the LIRB's attorney truly has authority to write decisions from whole cloth. Such a proposition finds no support in the State Code provisions creating the LIRB at 9 *Del. C.* § 1315, the Building Code provisions regarding administrative appeals at § 6.09.003, or the LIRB's Rules of Procedure (*See* Exhibit L to Opening Brief). Thus, the County's argument must be rejected.

The County cites the Court to the case of *Conway & Conway v. Zoning Board of Adjustment*, 1998 WL 283393, *2, Barron, J. (Del. Super., Feb. 20, 1998) in support of its argument that the attorney writing a Board decision may cull the record and pick out any conceivable justification to support a Board's unarticulated findings. The County's reliance upon the *Conway & Conway* decision is misplaced. First, the Superior Court appeal in the *Conway & Conway* case was based upon the "substantial evidence" standard

which asks whether such evidence exists on the record to support the Board's conclusions. *Conway & Conway* at *1-2. This standard permits the Court to cull through the record in order to find some possible justification for a Board of Adjustment's conclusion, which is precisely what Judge Barron did. *Id.* at *2. In the case at bar, the substantial evidence standard does not apply. *See Christiana Town Center, LLC v. New Castle County*, 2004 WL 2921830, **2 (Del., Dec. 16, 2004)(Order).

Second, an administrative appeal board may not "materially alter its analysis and adopt a new theory to support the result previously announced" verbally at the conclusion of a hearing. *Delaware Correctional Officers Ass'n v. State*, 2003 WL 23021927, *8, Noble, V.C. (Del. Ch., Dec. 18, 2003). In that action, the written decision of the Public Employment Relations Board cited to a standard which was not referenced by the Board when it rendered its oral ruling at the conclusion of its hearing. *Id.* The "standard" at issue, however, was simply a passage from a labor law treatise which did not reflect a material deviation from the oral decision. *Id.* In direct contradistinction to the *Delaware Correctional Officers Ass'n* case, the written decision prepared by the LIRB's attorney in the case *sub judice* puts words into the mouths of the LIRB members that never passed through their lips. The critical time for the LIRB to state their decision was at the end of the hearing when they spoke, which they failed to properly do. As a result, the Board's decision must be reversed due to its violation of the Delaware Freedom of Information Act pursuant to the reasoning contained in *Delaware Correctional Officers Ass'n*.

The *Delaware Correctional Officers Ass'n* case was also dependent upon the "crutch" of the substantial evidence test, which permitted the Court to find that there was some evidence in the record to support the differentiation between the written the decision and the Board's oral ruling. *Id.* at *5 and *8. Without the substantial evidence test, the Court is

not free to cull through the record to find some possible granule of justification for the Board's conclusory and otherwise unsupported denial of 395's appeal.

7. Petition Paragraph 8(b)(vii) (395's Reply Brief):

The LIRB Decision regarding the handrail must be reversed by this Court on the grounds that its reliance upon BOCA Code § 116.0 is impermissible due to: 1) the resultant violation of 395's Constitutional Due Process rights; 2) the inapplicability of the BOCA Code at the time of the issuance of the Violation Notice; and 3) the legally erroneous interpretation of the meaning of BOCA Code § 116.0. First, it is well established in this State that in order for an administrative hearing to withstand Constitutional Due Process scrutiny under the United States and Delaware Constitutions, a party must be provided with adequate notice and an opportunity to be heard. *County Council of Sussex County v. Green*, 516 A.2d 480, 481 (Del. 1986). Notice must be provided at a meaningful time and in a meaningful manner. *Formosa Plastics Corp. v. Wilson*, 504 A.2d 1083, 1089 (Del. 1986). The record clearly establishes that the County never charged 395 with a violation of § 116.0 of the BOCA Code. Nor did the Rule To Show Cause decision which 395 appealed to the LIRB rely upon that section (or even the BOCA Code generally). Thus, the County's assertion of a new legal basis for the violation alleged for the first time at an administrative appeal hearing deprived 395 of even the most minimum modicum of notice necessary to possibly withstand Due Process review. 395 had no notice, nor any opportunity to prepare to respond to the last minute argument presented by the County to the LIRB. Consequently, the LIRB decision should be reversed on those grounds alone.

Additionally, the County concedes that the BOCA Code was superceded by the County's adoption of the International Building Code effective January 1, 2002. *See* Answering Brief at 20. All three (3) of the Violation Notices

at issue in this action were issued later in the year 2002. Indeed, it is the County who asserts that subsequent occurrences in the year 2003 gave rise to modified charges which were considered at the January 30, 2004 Rule To Show Cause hearing which gives rise to this *Certiorari* appeal. Therefore, it is clear that the old BOCA Code simply did not apply to matters at issue in this action.

The County is so confused about what Code applies, that its Answering Brief cites the Court to § 115.1 regarding work being performed in a workmanlike manner. *See* Answering Brief at 21. Before the LIRB, the County argued that § 116.0 applied. And § 116.0 was precisely the section that the LIRB erroneously relied upon in its decision. *See* Exhibit D to Opening Brief at 40, and Exhibit J to Opening Brief at 4. Thus, the County and the LIRB's confusion as to what section applies is further grounds to establish the inapplicability of any BOCA Code provisions.

Finally, the BOCA Code provision cited by the County and relied upon by the LIRB is of no solace to the County's case even if it could apply. The language of the provision cited by the County before the LIRB states that "[a]ll work shall be conducted, installed, and completed in a workmanlike and acceptable manner so as to secure the results intended by this code." *See* Exhibit D to Opening Brief at 40 (emphasis added). The County and the LIRB relied upon this general statement as grounds to conclude that the handrail had to be painted or stained. *Id.* Of course, the County conceded at the LIRB hearing that the BOCA Code provision cited did not specifically state that paint or stain must be applied. *Id.* Therefore, the question for the Court to decide is whether the statement that work should be completed in a workmanlike manner "so as to secure the results intended by this code" can legally require the application of a finish coat to a wooden handrail. Section 116.06 of the BOCA Code cannot be magically transmuted into a requirement to apply a finish coat to a handrail. The clause requiring workmanlike work modifies the concluding

clause which states that it shall be "so as to secure the results intended by this code." Because the BOCA Code does not contain any specific requirement that a finish coat be applied to a handrail surface, the results intended by the BOCA Code do not include the application of a stain or paint finish. Thus, the handrail need not be painted or stained in order for its installation to be "workmanlike" under BOCA Code § 116.0. Consequently, the Court must reverse the LIRB on the grounds that it committed an error of law.

8. Petition Paragraph 8(c) (395's Reply Brief):

In its next desperate attempt to unjustly paint 395 as some sort of lawbreaker, the County cites irrelevant, non-record information and makes a red herring argument which has no effect on the outcome of this appeal.[5] Specifically, the County discusses the home warranty issue and attempts to chastise 395 for issuing a warranty after the County indicated that it must be provided. Defendant's Answering Brief ("Answering Brief") at 3-4. The Rule To Show Cause decision which is at issue in this *Certiorari* appeal provides that the home warranty is a non-issue, expressly stating that "[a] review of the Department's records reveals that a letter of partial compliance was sent to the respondent on June 27, 2003 and that matter is corrected." *See* Exhibit I to Opening Brief at 2. The County's criticism of 395's compliance with the law exemplifies the very unforgiving, inflexible, and overzealous attitude that has caused 395 to have to come before this Court on such picayune, minor issues. Unfortunately, the County is never satisfied.

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[5] Presumably this totally irrelevant issue is raised by the County so that it can make sure the Court is aware that 395 is owned by developer Frank Acierno. *See* Answering Brief at 3. This is a typical tactic used by the County, in an effort to prejudice the Court against 395 based upon the hope that the Court will decide the matter based upon any potential bias or prejudice that it may have against developer Frank Acierno, rather than on the merits. 395 is confident that the Court will ignore this snide litigation tactic, and certainly encourages the Court to rebuke the County for such sneakery.

9. Petition Paragraph 8(c) (Defendants' Answering Brief):

Rather than purchase a home warranty from a reputable and established home warranty company, the principal of 395, Frank Acierno, created a home warranty company known as Home Warranty of Delaware, LLC and finally issued a warranty on June 5, 2003 – four years after the certificate of occupancy was issued. See June 5, 2003 letter from Frank E. Acierno to Mr. and Mrs. Wise. Exhibit A. Thus, the failure to provide a home warranty had been corrected.

B. The Circumstances Which Gave Rise To The Briefs

1. The Violation Notices

In 2002, New Castle County ("County") issued three (3) Violation Notices to Abbott's client, 395 Associates, LLC ("395"): 1) Notice dated April 19, 2002 alleging "Install exterior coverage/windows as required by code to prevent water infiltration"; 2) Notice dated May 28, 2002 alleging "Obtain proper fall away from house as required by Code"; and 3) Notice dated July 25, 2002 alleging "Install handrail as required Code." Exs. 1.A., B., and C.[6]

2. The Rule To Show Cause Hearing Conducted By The Code Official

The three (3) alleged violations were the subject of a County Code Official Rule To Show Cause Hearing on January 30, 2004, followed by a written decision rendered on July 13, 2004. Ex. 1.I. The Rule To Show Cause Decision found that 395 was in violation of all three (3) charges despite the fact that: 1) the second and third charges chronologically were not issued until after the three (3) year

[6] References herein to "Ex. _" are to the exhibits contained in Respondent Richard L. Abbott's Hearing Exhibits submitted at the Board hearing conducted on September 13, 2006, most of which were admitted into evidence by the Board. (Exs. 1-4, 6-7 and 12-22). Any references to proposed but unadmitted hearing exhibits (5 and 8 through 11) are for background and not evidentiary purposes.

statute of limitations provided for under the County Code had already run; 2) a revised lines and grades plan was submitted by 395, approved by the County, implemented by 395, certified by 395's professional engineer, and the County's inspector admitted that the slope might be appropriate and he had no instrumentation to determine that it was not in order to be able to provide an accurate opinion; 3) a new, replacement handrail was installed at the appropriate height required by Code; 4) the last site inspections regarding all violations had taken place many months earlier in September of 2003; and 5) window repairs were properly performed and the County had no evidence the contrary. Ex. 1.I. at pp.2 and 3.

3. The Administrative Appeal Hearing Before The LIRB

395 appealed the Rule To Show Cause Decision to the New Castle County License And Inspection Review Board ("LIRB") and a hearing was subsequently conducted on December 14, 2004. Ex. 1.J. In a nutshell, the argument by 395's counsel at the LIRB hearing was the same as that presented to the Code Official at the Rule To Show Cause hearing:

> Based on the foregoing, the three (3) violations alleged against 395 are all : 1) time barred; and 2) barred from being administratively enforced since they are solely home warranty claims. In addition, the handrail and protective slope violations alleged were fully resolved and complied with by 395. The findings regarding the windows were also erroneous since the County had already inspected them and found them satisfactory. Further, the Code Official should have declined to impose any administrative penalties on the grounds that it was impossible for 395 to safely perform any further work at Mr. Wise's home due to his intimidating and

hostile conduct and personal threats toward 395's personnel. Therefore, the Board should reverse the findings of the Code Official pursuant to County Code § 6.09.003E. since the Decision is both legally erroneous and arbitrary and capricious based upon the facts and the law. Ex. 1.K.

At the conclusion of the hearing, the four (4) members of the LIRB rendered their decision orally and stated their bases for decision on the record. Ex. 2; Ex. 1.D. at 62-66. A summary of the statements of reasoning articulated by the members of the LIRB in support of their decision denying 395's appeal is as follows:

1. Mr. Weinberg: 1) violation notices issued January 18, 2002 and April 19, 2002 fall within the 3-year statute of limitations; 2) despite engineer certification indicating that grading was resolved, Code Enforcement agent found there was still puddling; 3) as a citizen if he had a handrail improperly installed and then had it fixed even though it might meet Code he "would be pretty annoyed"; and 4) when windows and flashing are installed one expects them to hold water out, and if they do not they "should be taken care of."
2. Mr. Bonvetti: 1) whether or not the handrail is finished or painted it is "just ridiculous"; and 2) the statute of limitations does not exclude the need to fix leaking windows.
3. Mr. Juhrden: Did not vote.
4. Mr. Maloney (LIRB Chairman): 1) based on his experience, "work is supposed to be installed in a complete

> and workmanlike manner"; 2) "it's obvious that this construction wasn't done properly"; 3) installation of windows and flashing is "a bunch of crap"; 4) the problem is not the windows, water is coming in from "the construction of the window the way it was installed"; 5) he does not know whether leaking in the basement windows was "due to improper installation or improper draining since there was no testimony one way or another on that issue"; and 6) the handrail job has to be finished to be finished. Ex. 3.

On December 30, 2004 the LIRB issued a written decision prepared by its legal counsel which purported (incorrectly) to contain the facts and LIRB decision rationale. Ex. 1.J. Unfortunately, the written decision was not supported by the record. Indeed, the written decision was not even approved by the three (3) members of the LIRB who voted.[7] The LIRB's written decision was only signed by its Chairman, Joseph J. Maloney, and the LIRB's attorney admitted at the Board hearing that the written decision was not provided to the other members nor approved by them. Ex. 1.J. and Trans. at 42.[8]

A summary of which minority of LIRB members may have actually supported which alleged statements of reasoning contained in the written decision by the LIRB's attorney is as follows:

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[7] The LIRB contains five (5) members. 9 *Del. C.* § 1315. Four (4) members were present. Exs. 1.D. and 1.J. In order to approve a motion, a majority of the LIRB members present (*i.e.* 3 out of 4) must support a motion. Ex. 1.L. at p.3 (Art. V, Section 2).

[8] References to "Trans. __" hereinbefore and hereinafter are to the transcript of the Board hearing conducted on September 13, 2006.

1. Pursuant to BOCA, which was not the basis for any of the three (3) alleged charges, the handrail repair was required to "be completed in a workmanlike and acceptable manner."

   a) Members who may have indicated this as a basis for their vote: Mr. Maloney[9]

2. The Department properly analyzed witness credibility and weighed the evidence in concluding that grading and leaking window violations still existed.

   a) Members who may have indicated this as a basis for their vote: Mr. Weinberg and Mr. Maloney (as to leaking windows only)

3. Two (2) Violation Notices were issued before the 3-year statute of limitations ran on April 30, 2002.

   a) Members who may have indicated this as a basis for their vote: Mr. Weinberg[10]

4. A third Violation Notice was issued after the 3-year statute of limitations passed, but 395 Associates, LLC waived the defense by failing to raise it within a sufficient time after receiving the Violation Notice.

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[9] Mr. Weinberg expressly found that the handrail did "literally meant [sic] the Code requirement" but that he was finding a violation because he would still be annoyed. And Mr. Bonvetti indicated that whether or not the fact that the handrail was finished or painted "could probably be argued until we are all in the grave," "It doesn't matter to me." Ex. 1.D. at 62-64.

[10] But *See* Ex.1.A., B., and C. for proof that only one (1) of the three (3) Violation Notices was actually issued prior to the April 30, 2002 running of the statute of limitations.

a) Members who may have indicated this as a basis for their vote: None. Ex. 4.

Consequently, the record is crystal clear that the written decision prepared by the LIRB's attorney was not in fact a correct and accurate representation of what the LIRB actually reasoned.

4. The Common Law *Certiorari* Appeal

395 initiated an appeal of the LIRB's decision pursuant to the filing of a *Certiorari* appeal proceeding in the Superior Court in January, 2005. The Superior Court subsequently issued a decision in which it reversed the LIRB with respect to two (2) of the three (3) charges at issue. Ex. 7. In pertinent part, the Court held that: 1) "the Board's decision that Plaintiff waived its statute of limitations argument on the Grading Violation is manifestly contrary to the law"; and 2) "the Court is unable to determine from the record how the Board reached its conclusion that the Handrail Violation was timely and not barred by the statute of limitations." Ex. 7 at pp.22 and 24.

It should also be noted that the Superior Court strangely failed to consider 395's estoppel argument on the Leaky Window issue due to the fact that the LIRB failed to decide the argument, even though it was clearly presented in a written Memorandum Of Law and argued orally at the LIRB hearing. Ex. 7 at pp.24-26.[11] Query why the Court did remand the issue to the LIRB for decision, or decide the issue based on the record before it? Since the record before the Court clearly established that a legitimate, well-founded argument had been presented to the LIRB but never decided by it, this would be both the logical and legally correct method of addressing the issue. Thus, 395 was effectively victorious and correct in all respects, including the Superior

[11] Query why the Court did not reverse and remand the Board's decision on the Window issue given the Court's authority to correct errors of law and remand where the administrative board has proceeded irregularly.

Court's rejection of a County argument that the LIRB lacked subject matter jurisdiction based on timeliness of the appeal; the Court found the argument to be untimely, unfounded, and wholly without merit. Ex. 7 at pp.9-12.

C. The Superior Court *Certiorari* Appeal Action, *395 Associates, LLC v. New Castle County, et al.* Was Not The First Time That The County Had Proceeded In A Legally Erroneous Fashion In Order To Harm The Owner Of 395, Frank Acierno

A litany of case law establishes that the County had acted illegally in treating 395's owner in the context of regulatory decisionmaking in the past. *See* Ex. 13.-15. Under the prior County Administration run by County Executive Thomas P. Gordon and Chief Administrative Officer Sherry P. Freebery, it had indeed become commonplace for the owner of 395 to be required to bring lawsuits against the County in order to obtain compliance with the law, and in order to stop the unlawful conduct of the County in attempting to shut down 395's owner from all land use activities in the County based upon the "hammer" of the County "Clean Hands Ordinance" (which permitted the County deny or suspend all permits, approvals, and stop all processing and review of applications based on one, single, minor outstanding violation). For example, it was necessary for 395 and related entities to file a lawsuit in Superior Court just to get the County to issue a Letter of Compliance in order to confirm that it was in complete conformance with County Code Home Warranty provisions. *See* Exs. 17.-21 and Trans. at 66-67.[12] Due to Judge Gebelein's court imposed deadline, the County finally complied with the law. Ex. 21 and Trans. 68.

The all too frequent abuse of the Constitutional and legal rights of the owner of 395 was succinctly described by

[12] The Transcript at Ex. 21 was supplemented in accordance with the Board's request at the Board hearing pursuant to a letter from counsel dated, and delivered to Stephen Taylor, on September 19, 2006.

Judge Robinson of the United States District Court for the District of Delaware:

1. "The facts of record [mistreatment of Acierno via County conduct which was arbitrary and ill-motivated] demonstrates substantive due process violations through the deliberate and arbitrary abuse of governmental power in the land use context." Ex. 15 at *17; and
2. The County's blatant misapplication of current law to a grandfathered plan established an Equal Protection violation since Acierno was "treated differently from other similarly situated individuals... ." *Id.* at *18.

Moreover, the County has previously undertaken efforts to improperly name Acierno as a defendant in an action solely for purposes of attempting to play on a possible negative public perception of Acierno. One case included the naming of Acierno as a party defendant despite the fact that the County who is the very record keeper of the Deeds which established without question that the landowner whom the County alleged was in violation of the law was Christiana Town Center, LLC, knew full well that naming him was without foundation. Ex. 22. Therefore, both Acierno and his counsel are constantly vigilant to make sure that any improper and improvident efforts to name him personally in proceedings is vigorously objected to.[13]

Further, because of the longstanding history of County acrimony toward Acierno, and the County's seemingly never-ending and incessant efforts to harm his reputation and illegally deny him the right to use and develop his lands, Acierno must take very tough and stern positions with respect to such highly reprehensible and inexcusable County conduct. The highly charged and blatantly outlandish conduct of County officials and employees in acting so

[13] That is to say nothing of the fact that Acierno wants to avoid any potential personal liability, which is the very basis for forming business entities and holding title to real estate under an artificial entity name.

unlawfully, unprofessionally, and improperly frequently gives rise to the need to include very strong language in pleadings in order to get the message across as to the magnitude of County misconduct and the concomitant need for judicial intervention. Oftentimes the County does not like to be tagged with the "black hat" based upon its sinister conduct, but our wise judiciary in this State has previously concluded that it is completely appropriate and justified.

Case in point is a decision rendered by the Court of Chancery in *Salem Church (Delaware) Associates v. New Castle County*, 2004 WL 1087341, Noble, V.C. (Del. Ch., May 6, 2004). In that case, the County moved to strike certain contents of the pleadings which alleged that conduct by high level State and County officials and employees was politically motivated and based upon personal animus against Acierno. Ex. 12 at *1-2. The Complaint also alleged an unlawful conspiracy between high level County and State elected officials undertaken in bad faith and with a motive to deny Acierno's legal rights based upon their own personal and political agenda and vendettas. *Id.* at *2. In the end, the Court held that "[t]he challenged allegations are relevant to the grounds tendered by Salem Church's support for the relief that it seeks," and that therefore "the allegations will not be stricken as immaterial or irrelevant." *Id.* at *3. Further the Court held that the allegations did not prejudice the County. *Id.* at *304. Therefore, it is well established that when firm, strong, terse, and highly accusatory matters are contained in pleadings filed with the Court they are perfectly permissible and appropriate as long as they directly address a point that is relevant to the case and do not cause any undue prejudice to the opposing party.

Finally, it should be noted that the charges at issue in this proceeding arise from litigation that emanated from the corrupt and crooked prior administration of disgraced former County Executive Thomas P. Gordon and his co-indictee in the Federal Racketeering and Fraud prosecution, Sherry P.

Freebery.[14] . The Code Enforcement section of the County department at issue in the litigation which gives rise to this proceeding is run by Department of Land Use Assistant General Manager George O. Haggerty, a former County Police Major, patrol partner of Tom Gordon, and probably the party whose initials "G.H." are included in the Federal Grand Jury indictment brought against Gordon and Freebery which alleges that certain improper conduct was carried out by G.H. at the behest of Freebery in the land use context.

Further, Gordon has previously made the public, political pronouncement that "Anything Frank Acierno is for I'm against, it's good politics." Trans. at 65. And Freebery and Gordon are no strangers to the abuse of Acierno through attacks on him and his representatives; they "manufactured" an issue to attack Abbott with in his 2002 race for re-election as a member of County Council by making false, libelous, and outrageous assertions based upon Abbott's completely appropriate representation of Acierno in matters involving the Delaware Department of Transportation (and not New Castle County). Trans. at 64-65. That is to say nothing of the voluminous litigation which Acierno was forced to bring, to the tune of ten (10) to twelve (12) court cases and as many administrative proceedings in the 2003-04 time period when the Gordon-Freebery administration was attempting to grab headlines and take as many actions and render as many harmful decisions as possible against Acierno in the hopes of garnering publicity for the election campaign of Sherry Freebery for County Executive. Trans. at 65-66. In short, Gordon and Freebery were known to have violated the public trust bestowed upon them by the citizens of New Castle County, and to frequently and with regularity abuse their power in order to advance their own personal and political agendas at the expense of Acierno.

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[14] Ms. Freebery has voluntarily surrendered her license to practice law as a result of the criminal racketeering and fraud case brought against her by the United States Attorneys Office, pursuant to the Federal Grand Jury indictment issued against her in May, 2004.

III. The First Amendment Limits The ODC Prosecution

A. Lawyer Speech is Constitutionally Protected

Disciplinary rules which impinge upon a lawyer's First Amendment right to free speech are constitutionally constrained. *Iowa Supreme Court Board of Professional Ethics And Conduct v. Visser*, 629 N.W.2d 376, 380 (Iowa 2001). Indeed, a lawyer's out of court statements regarding matters involved in litigation are entitled to First Amendment protection. *Id.*; *Commission for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 454 (Tex. 1998); citing *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075-76 (1991). First Amendment protections are even more important where speech involves criticism of the government or government officials (*e.g.* New Castle County and New Castle County attorneys). The U.S. Supreme Court has recognized that "debate on public issues should be uninhibited, robust, and wide-open, and...it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Garrison v. State of Louisiana*, 379 U.S. 64, 75 (1964), quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). It has been recognized that the primary purpose for the First Amendment free speech right is in fact the safeguarding of public discussion regarding governmental affairs. *In re: Green*, 11 P.3d 1078, 1085 (Colo. 2000) (*En banc*).[15]

It has also been noted that the free speech clause of the First Amendment protects a lawyer's criticism of even the legal system and its judges. *Committee on Legal Ethics of the West Virginia State Bar v. Douglas*, 370 S.E.2d 325, 332 (W.Va. Ct. App. 1988). Such speech is only proscribed if it constitutes a knowingly false statement or a false statement

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[15] The U.S. Supreme Court has even gone so far as to state that "[t]here is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment." *Gentile v. State Bar of Nevada*, *supra*. at 1034.

made with a reckless disregard for its truth. *Id.* Indeed, some jurisdictions have determined that in order to establish a violation of the Rules of Professional Conduct for criticism of judges, the disciplinary authority must prove: 1) the statement was a false statement of fact; and 2) the statement was made actual malice – *i.e.* knowledge that it was false or with reckless disregard as to its truth. *In re: Green, supra.*

B. The Heightened Standard Of Proof For Alleged Disciplinary Violations Based On Lawyer Speech

The standard for establishing a violation regarding the criticism of a government or governmental officials (such as County attorneys) cannot certainly be as stringent as that applicable to the criticism of judges. Therefore, the 2-part standard derived from the U.S. Supreme Court's landmark First Amendment free speech decision in *New York Times Co. v. Sullivan* should apply. This necessitates proof by the ODC by clear and convincing evidence that statements were false, and that they were made with actual malice. Anything less than proof of this stringent standard would violate fundamental First Amendment free speech protections guaranteed to all citizens, including lawyers.

Absent proof positive that the provisions of the Brief excerpts referred to in paragraph 8 of the Amended Petition For Discipline are in fact false, the Board on Professional Responsibility should conclude that no disciplinary violation has occurred. In addition, no violation can have occurred unless the ODC establishes by clear and convincing evidence that the Brief contents cited in paragraph 8 of the Amended Petition For Discipline were statements made by Abbott with knowledge of their falsity or with reckless disregard of their truth. This the ODC did not do; it even admitted that it was not challenging the factual or legal accuracy of the Briefs. Trans. at 7 and 75-76.

C. The Evidence Does Not Satisfy The Heightened Standard

The record reflects that the assertions made about opposing counsel and the criticisms of arguments contained in Defendants' Answering Brief were both factually supported and relevant to the outcome of the case. Indeed, the Superior Court ultimately decided largely in favor of the Plaintiff, thereby confirming the lack of merit to many of the arguments raised by the Defendants in defense of their ill-fated administrative decisionmaking.

The record also reflects that the points raised by Abbott, while arguably strong and sharp, were well-founded in fact. Consequently, this is the very type of lawyer speech which is so carefully guarded by protections guaranteed by the First Amendment to the United States Constitution.[16]

D. The Disciplinary Violations Alleged Violate Constitutional Free Speech Rights As Applied

The Disciplinary Rules alleged in this case, Rules 3.5(d) and 8.4(d), are also unconstitutional as applied under the circumstances. The U.S. Supreme Court has made it clear that vague regulations of free speech are proscribed based on the need to eliminate the impermissible risk of discriminatory enforcement. *Gentile v. State Bar of Nevada, supra.* at 1051. Indeed, the Supreme Court noted that "history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law."

In order to determine unconstitutional vagueness under the First Amendment, the question is whether "the Rule is so imprecise that discriminatory enforcement is a real possibility." *Gentile v. State Bar of Nevada, supra.* Under the circumstances of this matter, it is clear that the ODC is attempting to wedge criticisms of the opposing party and counsel into rules aimed at protecting the judiciary and the

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[16] This same protection of Free Speech is contained in Art. I, § 5 of the Delaware Constitution, which was added effective June 17, 2003. *See* 74 Del. Laws, c.112 ("The free communication of thoughts and opinions is one of the invaluable rights of a man....and any citizen may freely speak, write and print on any subject... .").

judicial system generally. In addition, the ODC has attempted to do so in the context of criticisms of conduct of the government and government officials, not just any general opposing party and counsel. And the ODC attempts to do so based upon rules that do not facially state an intent to protect opposing parties and counsel. Nothing in Rule 3.5(d) or 8.4(d) could lead any person to believe that strong wording and critical statements about an opposing government party and attorney could give rise to violations of rules protecting the tribunal and its administration. Consequently, the effort to prosecute Abbot under those Rules is constitutionally proscribed due to the vagueness of the DLRPC provisions at issue as applied.

IV. The ODC's Opening Memorandum: Rife With Conclusory And Unsupported Allegations, Completely Distinguishable Case Law, And A Wholesale Misreading Of The DLRPC

A. The Facts Are Very Much In Dispute

The ODC once again erroneously asserts that the facts at issue in this action are not in dispute. Opening Memo at 1.[17] For starters, the ODC incorrectly alleges that Abbott compared the LIRB to a group of monkeys in the Reply Brief. Opening Memo at 3. In addition, the ODC inaccurately alleges that Abbott only "accused" opposing counsel of writing a fictional decision on behalf of the LIRB. *Id.* Next, the ODC mistakenly submits that certain of Abbott's Brief comments were inflammatory and sarcastic. Finally, the ODC misrepresents the meaning of a footnote which addresses the impropriety of the County's reference to "Frank Acierno" in the Defendant's Answering Brief; the ODC attempts to twist Abbott's vote of confidence in the Court into an allegation of bias or prejudice by the Court.

Amazingly, the ODC continues to blatantly misrepresent an analogy contained in the Reply Brief. The

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[17] References to "Opening Memo at __" herein are to the Office of Disciplinary Counsel's Opening Memorandum In Support Of Findings Of Violations Of Rules 3.5(b) And 8.4(b).

analogy refers to a hypothetical situation which is representative of the inane nature of the County's legal argument that counsel to the LIRB can prepare a written decision and include therein anything that he or she feels like regardless of the documents of record, the transcript of the hearing, and the actual statements of reasoning articulated by the LIRB. The analogy does not say anything at all about the LIRB or its members. This was explained clearly and fully by Abbott at the Board hearing. Trans. at 100-01. Why the ODC persists in attempting to try and convince the Board that an apple is actually an orange in this fashion is beyond Abbott. But it does certainly appear to be indicative of the full throttle, no holds barred, blind to reality approach that the ODC has taken in prosecuting the factually and legally unsupported allegations against Abbott.

The ODC also misses the mark by failing to recognize that Abbott did not just "accuse" opposing counsel of fabrication of matters in the written decision prepared for the LIRB; Abbott actually proved beyond *peradventure* that the written decision had no basis in fact. At the hearing, the LIRB's attorney could not explain any justification for the conclusions that he reached in the written decision. Trans. at 36-40. Nor could the LIRB's attorney explain how he reached conclusions that were not supported by any record evidence whatsoever. *Id.* Indeed, the evidence establishes with complete clarity that the written decision prepared by the LIRB's attorney was both unapproved by a majority of the LIRB and not representative of the reasoning stated by the LIRB members when they rendered their oral decision at the conclusion of the hearing. It is both logically and legally impossible for a true, relevant and on-point comment with respect to the fictional nature of a written decision at issue in litigation to constitute a disciplinary violation. Accordingly, the ODC is so far 0 for 2 in trying to prove its farfetched allegations.

Nor is language contained in the Brief either inflammatory or sarcastic. Abbott has cited the Board to

specific case law in which Delaware Judges, many of whom are highly esteemed and revered by the Bench and Bar, have utilized verbiage similar to that which the ODC conclusorilly alleges is unethical.[18] Setting aside the ODC's offensive indirect attack on certain Judges, however, the fact is that language which is utilized in appropriate and applicable circumstances by the Courts of this State cannot possibly give rise to an ethical violation. Indeed, the ODC has not responded to the Board's request made at the Board hearing to provide counter-arguments and decisional law supporting its position on this subject. *See* Trans. at 111-12. Therefore, the ODC is hypocritically guilty of exaggeration in the context of its allegations regarding inflammation.

The ODC also misfires with respect to its allegation of improper sarcasm in the Briefs. Sarcasm includes an element of untruth. Indeed, it involves "amusing,...startling, or surprising difference...between what is given out and accepted and what is really true." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 2014. The ODC did not allege, present evidence, or prove that any of the matters contained in the Briefs at issue were untrue. In fact, the ODC conceded the truth of the Briefs at the Board hearing. Trans. 7 and 75-76. And given the totally unfounded nature of the County's proceedings against 395 under the circumstances, combined with the decades-long history of illegal abuses of authority carried out by the County against 395's owner, it is hard to imagine how such a factual and relevant handful of comments could even rise to the level of a violation of the Principles, let alone a violation of the DLRPC.

Finally, the ODC continues to omit and overlook the other sentences contained in the footnote of the Reply Brief. Read in its entirety and in the overall context of the case, it is

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[18] Abbott also explained at the Board hearing how the County was in fact attempting to deny 395 a fair hearing. Trans. at 101-02. And Abbott showed why the County's efforts to switch Code provisions charged and to rely upon catchall Code provisions for specific deficiencies was improper. Trans. at 60-61 and 99.

clear that the footnote comment at issue was made so as to bring inappropriate (and potentially unethical) comments of the County to the Court's attention, and to state that 395 and its counsel firmly believed that the Court would not fall for the County's red herring reference to "Frank Acierno" and his supposed "disreputable" character:

> Presumably this totally irrelevant issue is raised by the County so that it can make sure that the Court is aware that 395 is owned by developer Frank Acierno...395 is confident that the Court will ignore this snide litigation tactic, and certainly encourages the Court to rebuke the County for such sneakery (which the Court did). (emphasis added).

Abbott explained this fact clearly at the Board hearing. Trans. at 102-03. Yet the ODC continues to soldier on, blindly ignoring the truth and alternatively attempting once again to convince the Board that an apple is actually an orange.

B. Renewal Of Motion To Dismiss For Lack Of Subject Matter Jurisdiction And Failure To State A Claim Upon Which Relief Can Be Granted

Abbott hereby renews the Motion To Dismiss for lack of subject matter jurisdiction; the ODC charges what amounts to an allegation of a violation of the Principles, not the DLRPC. Abbott also renews his Motion to Dismiss based on the failure of the Amended Petition to state adequate facts necessary to set forth a claim which could establish violations of Rules 3.5(d) and 8.4(d) by Clear And Convincing Evidence. Abbott hereby incorporates by reference the contents of the Motion To Dismiss Amended Petition and the Respondent's Reply In Support Of His Motion to Dismiss. Additionally, Abbott hereby renews his Motion for Judgment As A Matter Of Law. This motion is based upon the pre-trial and trial Motions to Dismiss and rule 50 motion.

C. Severe, Highly Offensive Language Or Conduct Is Required To Prove A Violation Of Rules 3.5(d) and/or Rule 8.4(d)

1. Case Law Cited By The ODC Is Inapposite

In its Opening Memo, the ODC asserts that cases which conclude that litigation conduct giving rise to Court sanctions constitutes precedent establishing what attorney conduct is adequate to establish a violation of DLRPC Rules 3.5(d) and 8.4(d). Opening Memo at 5. But the case of *Kaung v. Cole Nat'l Corp.*, 884 A.2d 500, 507-08 (Del. 2005) merely approved a fee shifting award based on the conduct of *pro hac vice* counsel. The attorney's admission *pro hac vice* was not revoked, nor is there any indication that any disciplinary charges were alleged, referred to the ODC, or ultimately established. Therefore, the case of *Kaung v. Cole Nat'l Corp.* is of no solace to the ODC's cause.

If it were appropriate to look at cases regarding improper conduct of *pro hac vice* counsel to determine the necessary standard to find a violation of Rules 3.5(d) or 8.4(d), then the Board should look to a case where a court of this State actually revoked the *pro hac vice* admission of out-of-state counsel. Arguably such a revocation is akin to a finding of disciplinary violations sufficient to constitute precedent establishing the standard necessary for violations of DLRPC Rules 3.5(d) and 8.4(d) to be proven. In fact, Abbott was the victim of precisely such inappropriate conduct by an opposing party and his counsel in *State v. Mumford*, 731 A.2d 831 (Del. Super. 1999).

In *State v. Mumford*, counsel for the State (Abbott) sought the revocation of the *pro hac vice* admission of the attorney for the defendant landowner in a condemnation proceeding. The Court described the highly offensive deposition testimony of Mr. Mumford thusly:

> As a result of the dispute, the plaintiff took the deposition of Mumford in which Mumford behaved abominably. He was crude,

> frequently used obscenities, and even threatened the deposing attorney with physical violence. *State v. Mumford* at 833. (emphasis added).

The court went on in its decision in *State v. Mumford* to cite a specific litany of profane and vulgar words and commentary spewed by the deponent. The court noted that *pro hac vice* counsel present at the deposition on behalf of Mumford did not attempt "ameliorate the disruptive and offensive conduct of Mumford," and instead appeared "to assent to or encourage the conduct of Mumford." In addition, the court noted numerous apparent inappropriate communications with the witness (*i.e.* "coaching").

As a result of this outlandish combined conduct of the party and counsel, the court in *State v. Mumford* revoked out-of-state counsel's admission to practice in Delaware, citing both Rules 3.5(d) and 8.4(d) and *Paramount Communications v. QVC*, 637 A.2d 34 (Del. 1994). So it is well established in Delaware that a high degree of outrageous conduct is necessary to establish the disciplinary charges alleged by the ODC. The ODC's "facts" fall far short of the degree of egregiousness necessary to prove its case, particularly given the high "Clear and Convincing Evidence" threshold of proof.

The ODC also cites the case of *Sonksen v. Legal Services Corp.*, 389 N.W.2d 386, 388-89 (Iowa 1986) for the proposition that lawyer conduct can degrade a tribunal even if not directed at a judicial officer. Opening Memo at 6-7. The ODC concedes, however, that the brief at issue in that case included "the most offensive racism and cruel sarcasm about the poor." Not so in the case at bar. Indeed, the nature of the commentary contained in the brief at issue in the *Legal Services Corp.* case undoubtedly changed the entire outcome of that case; Comment [3] to Rule 8.4 expressly indicates that racist and socioeconomically demeaning commentary is proscribed by Rule 8.4(d) even if it is otherwise "legitimate advocacy." In addition, one can easily see how a Judge

would be degraded pursuant to statements constituting racial epithets and socioeconomic disparagement, just as the Judge in *In Re: Ramunno* was degraded by the crude, anal language of the attorney and his unfounded allegation that the Court was biased against the attorney. Consequently, the *Legal Services Corp.* case is totally inapposite.

2. Delaware Cases On Point Establish The Standard: Egregious And Offensive, Not Subjectively Distasteful

In order to establish that language used by an attorney is "undignified or discourteous" it is necessary for the language to rise to the level of profanity, vulgarity, or contumaciousness. *Christopher v. State*, 824 A.2d 890, 892-93 (Del. 2003)(attorney directly addressed the court and called its decisions "unwise," "preposterous," and "ridiculous"); *In re: Shearin*, 721 A.2d 157, 162 (Del. 1998)("castigating the trial judge in personal terms and suggesting that there were rumors he had been bribed by opposing party."); *The Matter of Ramunno*, 625 A.2d 248 (Del. 1993)(attorney "referred to opposing counsel in a crude, but graphic, anal term" in the court's presence, and alleged that the judge found him in contempt to "get even" with him); *In re: Kennedy*, 503 A.2d 1198, 1205 (Del. 1985)(attorney tardily barged into court proceeding, argued with the court, and disregarded court admonitions). Indeed, the Table of Cases attached hereto establishes that in order to disrupt or degrade contrary to Rule 3.5(d) an attorney must generally undertake conduct in a court proceeding aimed directly at a Judge which involves matters such as: 1) allegations of racial or religious bias; 2) unfounded assertions of judicial improprieties; 3) inappropriate sexual commentary; 4) attorney intoxication; 5) attacks on judicial integrity; 6) retorts which harshly attack Court rulings; and 7) use of profane or vulgar language. Ex. 8 and Abbott 1.[19]

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[19] Citations to "Abbott _"refer to the Exhibits attached to this Answering Memorandum In Support of Dismissal of Allegations.

Because the Petition fails to allege any such conduct it should be dismissed as legally inadequate to state a claim.

The definition of the word "degrade" is to "lower from a superior to an inferior level." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 594. No allegation is contained in the Petition, nor was any evidence adduced at the Board hearing, that Abbott undertook any conduct which lowered the Superior Court to an inferior level. Indeed, the Petition and ODC's proof only support the theory that the opposing party and counsel were degraded (*i.e.* lowered from a superior to inferior level).[20]

At the Board hearing, both of the County's attorneys at issue in the *395 Associates, LLC v. New Castle County* case were present and testified. No testimony was elicited by the ODC from those witnesses which would tend to establish that even they were degraded. Indeed, it would be hard for Ms. Jacobson to have been degraded given the fact that she had absolutely no explanation for the completely irrelevant, and ill-intended reference to "Frank Acierno" in her Answering Brief. *See* Trans. at 55-56 and 58-60.[21] Nor is it possible to imagine how Mr. Merritt could have been degraded when he was unable to describe: 1) any record evidence supporting the contents of portions of the written decision he prepared for the LIRB; or 2) why he did not obtain the consent of a majority of the LIRB before allowing the written decision to be issued. If opposing counsel, who are not even at a superior level to Abbott in the context of the litigation which gives rise to the ODC's charges, were not degraded, then how could any reasonable person sitting as a

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[20] It is not even clear that opposing parties and counsel are at a "superior level" to Abbott, from which they could be lowered. Lawyers and parties are actually all on the same level. This is in contrast to Judges and Courts, who are unquestionably on a superior level to lawyers, from which they could be lowered in esteem and respect.

[21] Nor for that matter could Ms. Jacobson explain why she represented multiple, adverse defendants in the *Certiorari* appeal proceeding. Trans. at 52-53.

judicial officer be legitimately degraded? Obviously, that is a rhetorical question.

3. Egregious Language Or Conduct Of A Crude, Vulgar, Profane, Racist, Or Other Highly Offensive Nature Must Be Shown In Order To Establish A Violation

Cases from 27 other jurisdictions reveal that conduct such as giving the Judge the middle finger, attacking a Judge's truthfulness or honesty, making *ad hominem* personal attacks on a Judge, appearing before a Judge intoxicated, insulting a Judge, using profanity in front of a Judge, and the like are necessary in order to show a violation of Rule 3.5(d). Abbot 1. The ODC admits no such evidence is present in the case at bar, and therefore its case should be dismissed due to a total lack of evidence to support the allegation.

4. The Petition Claims Are Barred Based Upon The Proscription Against Legislating From The Bench and The Principle Of Preemption

It should also be noted that the Delaware Supreme Court has made the conscious decision to provide for a specific rule in order to regulate the conduct of a lawyer *vis a vis* opposing parties and opposing counsel. DLRPC Rule 3.4 sets forth the regulatory requirements that a lawyer must abide by in dealing with an opposing party and an opposing counsel. If the Delaware Supreme Court wanted to prohibit biting and sharp criticisms of the arguments, conduct and positions taken by opposing parties and their counsel, it would have done so by expressly including such proscriptions in Rule 3.4. By submitting that a situation within the scope of Rule 3.4 but not within its range of prohibitions can still constitute a violation of the DLRPC the ODC requests the Board to legislate from the Bench.[22] This

[22] To do so would also unconstitutionally impose an *Ex Post Facto* law on Abbott. Del. Const. Art. I, §§ 7 and 9.

the Board cannot do. *Schueler v. Martin*, 674 A.2d 882, 888 (Del. Super. 1996).

No violation of Rule 3.4 is alleged, despite the fact that the Petition alleges violations based on conduct toward the opposing party and opposing counsel. The Delaware Supreme Court made the express determination to set forth a lawyer's duties to opposing parties and counsel in a specific rule. Therefore, the ODC's effort to make comments aimed at an opposing party and counsel a violation of other rules is also expressly preempted by the DLRPC itself. *Cantinca v. Fontana*, 884 A.2d 468, 473-74 (Del. 2005).[23] Rule 3.4 was intended to be, or is implicitly construed to constitute, the exclusive rule for purposes of regulating lawyer conduct toward opposing parties and counsel. Consequently, the Petition fails to state a claim for unfair conduct to the opposing party and counsel as a matter of law under the doctrine of preemption.

There are no other DLRPC Rules other than Rule 3.4 which directly and solely address the responsibilities of lawyers to opposing parties or opposing counsel. The only other remotely related Rules are instead aimed at protecting the lawyer's client or the justice system generally.

DLRPC Rule 1.15 is aimed at protecting client and third person property. Rule 3.2 is intended to insure the efficient administration of justice. *See* Comment [1] thereto. Rule 3.6 "sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding." *See* Comment [3] thereto. Rules 4.1(a) and 4.4(a) impose duties to third persons, not opposing counsel or parties. And Rules 4.1(b) and 4.4(b) apply to third persons and others, not just opposing parties and counsel. Rules 4.2 and 4.3 are intended

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[23] If the ODC wants to prohibit lawyer conduct toward opposing parties and counsel beyond that proscribed by Rule 3.4, then it is certainly free to seek Supreme Court approval. It cannot, however, unilaterally rewrite the DLRPC *post facto*.

to protect opposing parties who are represented or unrepresented, but the general objective is "the proper functioning of the legal system... ." *See* Comment [1] to Rule 4.2.

Rules 3.5(d) and 8.4(d) are aimed at protecting the Court and the system of justice generally, not opposing party and counsel specifically. Rule 3.5(d) prohibits conduct intended to disrupt the tribunal or which is undignified or discourteous so that it degrades the tribunal. Rule 8.4(d) proscribes conduct "prejudicial to the administration of justice." The Petition and the ODC's evidence only show criticism of the opposing party and its counsel. Thus, the ODC's allegations miss the mark.

D. The Case Law Asserted In Support Of The Rule 8.4(d) Charge Is Not On Point

1. The Decisional Law Authority Cited By The ODC Is Distinguishable

The cases cited by the ODC in support of the alleged Rule 8.4(d) violation are all inapposite. Rule 8.4(d) was relied upon to discipline an attorney in *In re: Benge*, 783 A.2d 12791281 and 12831 (Del. 2001) for: 1) numerous unexcused delays in administering an Estate; and 2) failed to communicate with clients pursuant to a prior disciplinary order, resulting in a petition to have him removed as counsel in a pending matter. Such conduct inures to the serious detriment of a client. No such prejudice is involved in this matter. If a Judge believes that a particular comment contained in a brief has no bearing on the outcome of a case, then he or she is free to simply disregard it.

Similarly, *In re: Guy* bears no resemblance to the allegations brought in this proceeding. Specifically, Mr. Guy failed to appear at two (2) consecutive trial calendar calls on behalf of a client, and then completely failed to respond to ODC letters requesting an explanation. Indeed, the Board On Professional Responsibility and the Delaware Supreme Court

ultimately concluded that such conduct was not violative of Rule 8.4(d). Certainly Mr. Guy's conduct in failing to appear at two (2) Court appearances on behalf of a criminal defendant and similarly ignoring two (2) requests for explanation from the ODC is a matter more prejudicial to the administration of justice than the language contained in the Respondent's Briefs. Accordingly, the ODC has not alleged sufficient facts to state a Rule 8.4(d) claim against the Respondent.

The ODC also cites the matter of *In re: Mekler* in support of its case. Mr. Mekler was found to have violated Family Court Rule 11 by filing a frivolous pleading. The Board on Professional Responsibility and the Supreme Court reasoned that the violation of a Court Rule *ipso facto* established professional misconduct in violation of Rule 8.4(d). No allegation is made in the Petition, however, that any Superior Court Rule was violated. Therefore, *In re: Mekler* does not support the ODC's allegation.

Nor are the cases cited by the ODC regarding misrepresentations and certificates of compliance apposite to the case at bar. *See* Answering Memo at 8. False representations are not at issue in this matter. Strong language regarding erroneous, unfounded, and improper contents of an opposing party's brief, and terse criticism of the opposing party's legally unsupported and unsupportable positions is not only contrastingly true, it is completely relevant and on point under the circumstances. As a result, the Certificate of Compliance violation analogy attempted by the ODC falls flat.

Finally, cases from other jurisdictions have held that in order to establish a violation of Rule 8.4(d) highly egregious circumstances such as: 1) the willful failure to pay taxes; 2) engaging in or soliciting sexual relations with a client; 3) ignoring numerous inquiries from disciplinary counsel; 4) numerous failures to comply with specific court ordered deadlines and obligations in litigation; 5) misappropriation of client funds; 6) misrepresentations to

disciplinary counsel; 7) numerous and frequent failures to appear in court and participate in court proceedings; 8) DUI convictions; 9) false notarization; and 10) numerous instances of neglect of responsibilities to clients and cases. Abbott 2. No such conduct occurred in the case *sub judice*. As a consequence, the ODC's charges should be dismissed.

2. The Petition Fails To State A Claim And The ODC Failed to Prove A Violation Under Rule 8.4(d)

The ODC alleged that excerpts from the Briefs constituted "conduct that is prejudicial to the administration of justice." But Comment, [3] to Rule 8.4 expressly indicates that "[l]egitimate advocacy respecting the foregoing factors does not violate paragraph (d)." The "factors" which must be avoided are the knowing manifestation by words or conduct of "bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status." The Petition does not allege, and the ODC did not prove to a high degree of probability, that the Briefs contained any of the disfavored "factors". Nor did the ODC allege or prove that contents of the briefs fell outside the bounds of "legitimate advocacy," as required in order for a valid claim under Rule 8.4(d) to be stated and established.

The term "legitimate advocacy" is not expressly defined in the DLRPC. The preamble to the DLRPC, however, does state that a lawyer advocate "should zealously assert the client's position under the rules of the adversary system." Obviously, the rules of the adversary system include rules regarding relevance as provided for in Superior Court Civil Rule 26 and Rules 401 through 403 of the Delaware Rules of Evidence. But the ODC has admitted that it did not allege or even attempt to prove that the contents of the Briefs were anything but completely relevant and accurate.

Instead, the ODC has alleged that Abbott violated the DLRPC pursuant to Brief contents which: 1) attacked the validity of the written decision appealed from on legal

grounds; 2) directed the Court's attention to inappropriate references in the County's Answering Brief; and 3) challenged the legal validity of the opposing parties' actions and legal positions. These are all points of "legitimate advocacy". And the ODC has not presented any case law or other persuasive legal authority to the contrary. Therefore, the contents of the Briefs cannot form the basis for a violation of Rule 8.4(d) as a matter of law.

3. The ODC's Failure To Explain How Certain Words Can Be Unethical Is Grounds For Dismissal

The ODC Opposition also fails to reply to numerous cases relied upon by Abbott which establish that the use of the terms "laughable", "pure sophistry", "ridiculous" and "magically" are proper if the circumstances warrant. *See* Ex. 10 and Abbott 3. Nor does the ODC respond to the argument that certain contents of the Briefs which are selectively quoted and/or heavily ellipsized and/or diametrically mischaracterized so as to fundamentally change the meaning of the Brief language. Therefore, the ODC's case abysmally fails to meet the Clear and Convincing Evidence standard.

4. The ODC's Inability To Disprove The Legitimacy And Applicability Of The Brief Language When Considered In *Toto*, Is Fatal To Its Case

The Opening Brief and the Reply Brief are both referred to in the Petition. Therefore, the Briefs may be viewed in their entirety for purposes of deciding the Respondent's Motion To Dismiss. By doing so, the inaccuracy of the allegations contained in the Petition become readily apparent.

The analogy referenced at paragraph 8(b)(vi) of the Petition simply points up the dislogic of the County's argument that the LIRB's lawyer may cull the record to conjure up any conceivable justification possible for an otherwise conclusory and unexplained decision rendered orally by the LIRB at the conclusion of a hearing. Indeed,

common law *Certiorari* proceedings are not subject to the "substantial evidence" standard which would enable the County to point the Superior Court to the entirety of the record for purposes of justifying an LIRB decision which the members did not explain. *Christiana Town Center, LLC v. New Castle County*, 2004 WL 2921830, *2 (Del., Dec. 16, 2004) (Order). Nor may the transcript of the proceeding be relied upon as part of the "record." *395 Associates, LLC v. New Castle County*, 2006 WL 2021623, *5, Jurden, J. (Del. Super., July 19, 2006) (Ex. 7).

Additionally, the Petition's allegation regarding a footnote contained in the Reply Brief cannot withstand the accuracy test when viewed in light of the entirety of the footnote language. *See* Petition at para. 8(c). In fact, the footnote directed the Court's attention to the irrelevant reference in the County's Answering Brief to the owner of 395 Associates, LLC (Frank Acierno). The footnote also contains an express vote of confidence that the Court will not fall for the apparent effort by the County to potentially decide the case based upon its perception of Mr. Acierno. In short, the footnote merely recognized that Judges are human and that the Court would undoubtedly ignore the County's attempt to appeal to the Court's personal feelings.

Further, the allegation contained in paragraph 8(b)(vii) is puzzling at best. The entire sentence, read in context, simply points out that a general "catchall" provision regarding the completion of home construction in a "workmanlike manner" cannot be applied to require the application of a finish coat to a wooden handrail. Given the fact that the handrail violation was directly before the Superior Court, it is hard to imagine how a completely relevant argument regarding the inapplicability of the law to the facts can constitute an "inflammatory characterization."

It should also be noted that the end result of the *Certiorari* appeal to the Superior Court was a reversal of two (2) of the three (3) charges at issue. Indeed, the Superior Court held that one (1) of the charges was expressly barred

by the statute of limitations, and that a second charge might be barred as well. This conclusion was just as clear and straightforward to the Superior Court as it should have been to the County in the proceedings below.

In addition, it is clear that the County attempted to raise new issues on appeal both before the LIRB and the Superior Court. The county was hardly following clear cut rules of law.

And despite the Superior Court's ultimate conclusion that it could not review the facts in the administrative proceeding, the record clearly establishes that there was no legitimate foundation for the LIRB to conclude that a grading violation had occurred. Evidence from an expert engineer on behalf of 395 indicated that full compliance was achieved. All the County presented was the testimony of an inspector who did no testing, had no expertise, and could only state that there might still be a discrepancy. Under these circumstances, it is hard to imagine how an administrative process could conclude that violations had been established. Consequently, the commentary contained in the Briefs was merely a reflection of the County's improper treatment of 395, not a violation of Rule 3.5(d) or Rule 8.4(d).

IV. Conclusion

Based on the foregoing, the ODC has failed to prove a violation of Rules 3.5(d) or 8.4(d) by Clear and Convincing Evidence. The Board should recommend that the charges be dismissed.

/s/ Richard L. Abbott, Esquire

Richard L. Abbott, Esquire (#2712)
724 Yorklyn Road, Suite 240
Hockessin, DE 19707
(302) 489-2529

Dated: November 14, 2006

CERTIFICATE OF SERVICE

I, Richard L. Abbott, Esquire, hereby certify that on this 14th day of November, 2006, I had two (2) copies of the foregoing **Respondent's Answering Memorandum In Support of Dismissal Of Allegations** served on the below-listed individuals as indicated:

VIA HAND DELIVERY

Andrea L. Rocanelli, Esquire
Office of Disciplinary Counsel
Supreme Court of the State of Delaware
Carvel State Office Building
820 North French Street, 11th Floor
Wilmington, DE 19801

/s/Richard L. Abbott, Esquire
Richard L. Abbott, Esquire
(#2712)

BOARD ON PROFESSIONAL RESPONSIBILITY
OF THE SUPREME COURT OF DELAWARE

IN THE MATTER OF A MEMBER OF THE BAR OF THE SUPREME COURT OF THE STATE OF DELAWARE:	§ § § § §	Board Case No. 8, 2006 **CONFIDENTIAL**
RICHARD L. ABBOTT, Respondent.	§ §	

REPORT OF THE BOARD ON PROFESSIONAL RESPONSIBILITY ON DISCIPLINARY VIOLATIONS

Pending before a Panel of the Board on Professional Responsibility ("Board") is a Petition for Discipline ("Petition") filed on July 12, 2006, as amended on September 5, 2006, involving Richard L. Abbott (?Respondent"), a member of the Bar of the Supreme Court of the State of Delaware. The Board held a hearing on September 13, 2006. This is the Board's report with respect to the alleged disciplinary violations.

Procedural History

This matter arises out of statements made by the Respondent in briefs filed in the Superior Court. The original Petition was filed on July 12, 2006. On July 28, 2006, Respondent filed a Motion to Dismiss the Petition and a Response to the Petition. Respondent then issued a subpoena to the Superior Court judge presiding over the case in which the briefs had been filed. On August 15, 2006, the Department of Justice, on behalf of the Superior Court judge, filed a Motion to Quash the subpoena. On September 1, 2006, the Chair of the Board conducted a telephonic conference to consider the Motion to Quash. As a result of that conference, Respondent agreed to withdraw the

subpoena and the Office of Disciplinary Counsel ("ODC") and the Respondent agreed that an amended petition would be filed deleting certain allegations and certain exhibits. On September 5, 2006, an Amended Petition for Discipline ("Amended Petition") was filed.

On September 7, 1006, the Chair of the Panel heard argument on the Respondent's Motion to Dismiss. Although the Motion to Dismiss was directed toward the original Petition, most of the arguments raised by Respondent with respect to the original Petition were also applicable to the Amended Petition. Accordingly, the parties' oral arguments were directed to the Amended Petition. Following argument, the Chair of the Board denied the Motion to Dismiss and the matter proceeded to the September 13, 2006 hearing. At the hearing, the Chair of the Board directed Respondent to file a response to the Amended Petition and, if he chose, a renewed motion to dismiss. Accordingly, on September 19, 2006, the Respondent filed hi Response to the Amended Petition and a Motion to Dismiss to dismiss it. Although the Response and Motion to Dismiss were filed after the September 13, 2006 hearing, the parties conducted the hearing with the understanding that Respondent was denying all of the substantive allegations in the Amended Petition (just as he had in his response to the original Petition). September 13, 2006 Tr. At 2-3. It was also understood that Respondent reserved his right to assert all of the defenses raised in his response to the original Petition and to renew the arguments made in his initial Motion to Dismiss. Id.

The Panel requested post hearing briefing. That briefing concluded on November 27, 2006. On November 29, 2006, Respondent filed a Motion to Strike portions of the ODC's Reply Memorandum. The Board finds it unnecessary to decide this motion.

Facts

Respondent was admitted to the Bar in 1989. Amended Petition ¶1; Response to Amended Petition ¶1. At

all times relevant to the Amended Petition, Respondent was engaged in the private practice of law in Delaware. Id.

In January 2005, Respondent filed a certiorari action in the Superior Court on behalf of his client, 395 Associates, LLC ("395 Associates"), seeking review of an administrative decision by the New Castle County Department of land Use and an appellate decision issued by the New Castle County Board of License, Inspection & Review ("LIRB"). Id. at ¶2; ODC Ex. 1 at p. 1.[1] The certiorari action was docketed at 395 Associates, LLC v. New Castle County, et al., Del. Super., C.A. No. 05A-01-013. Amended Petition ¶2; Response to Amended Petition ¶2.

In April 2005, the Respondent filed an opening brief in the Superior Court on behalf of 295 Associates. Id. at ¶3. In July 2005, defendants filed their answering brief. Id. at ¶4. In August 2005, the Respondent filed 295 Associates' reply brief. Id. at ¶5.[2]

Alleged Violations of the Delaware Rules of Professional Conduct

In the Amended Petition, the ODC alleges that statements made by the Respondent in the opening and reply briefs were undignified and degrading to the Superior Court and were prejudicial to the administration of justice. Amended Petition ¶6. Specifically, the ODC alleges that Respondent violated Rules 3.5(d) and 8.4(d) of the Delaware Lawyers' Rules of Professional Conduct ("Rules") in several ways.

First, ODC alleges that Respondent violated Rules 3.5(d) and 8.4(d) by accusing opposing counsel of fabricating legal grounds for the administrative decision challenged by 395 Associates. The ODC refers to the following statements

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[1] Specifically, the certiorari action challenged a Rule To Show Cause decision dated July 13, 2004 and a LIRB decision denying 395 Associates' appeal in an oral ruling on December 14, 2004. On December 30, 2004, a written opinion was issued. ODC Ex. 1 at p.1.

[2] The opening, answering and reply briefs were admitted as ODC Exs. 1, 2 and 3.

made in the opening and/or reply briefs submitted by Respondent:

- "A fictionalized account of the hearing written by lawyers." ODC Ex. 1 at p. 1
- "Miraculously, with the aid of legal counsel's imaginative and creative writing skills, the supposed reasoning for the LIRB's decision became dramatically more extensive and well-reasoned." ODC Ex. 1 at pp.5-6.
- "Fictional account of the LIRB hearing prepared weeks later." ODC Ex. 1 at p. 9.
- "The written decision creates an imaginary, make-believe set of reasons for the LIRB's findings." ODC Ex. 1 at pp. 9-10.
- "The County cites no legal authority to support its assertion that the LIRB's attorney may fabricate conclusions of the LIRB in the written decision." ODC Ex. 3 at p. 7.
- "Certainly the County does not believe that the LIRB's attorney truly has the authority to write decisions from cloth." ODC Ex. 4 at p.7.

Second, the ODC Asserts violations of Rule 3.5(d) and 8.4(d) based on the following allegedly inflammatory characterizations made in the opening and reply briefs:

- "Laughably, the County found that the violation was not resolved based on an illogical and irrational dissertation." ODC Ex. 3 at p. 2.
- "Why would the County want to start making decisions on the merits when it could continue to run 395 into the ground for sport based on whatever whimsical speculation the County could conjure up?" ODC Ex. 3 at pp. 2-3.
- "The county's argument...constitutes pure sophistry." ODC Ex. 3 at p. 4.

- "The County's own answering brief provides the legal authority to quickly dispense with this ridiculous argument." ODC Ex. 3 at p. 4.
- "Never one to miss an opportunity to deny a party the right to a fair and impartial hearing on the merits." ODC Ex. 3 at p. 7.
- "Otherwise the County would be permitted to appoint a group of monkeys to the LIRB, and simply allow the attorney to interpret the grunts and groans of the ape members and reach whatever conclusion the attorney wished from the documents of record." ODC Ex. 3 at p. 7.
- "[T]he...Code cannot be magically transmuted." ODC Ex. 3 at p. 18.

Finally, the ODC alleges that the reply brief submitted by Respondent improperly implied that the Superior Court might rule on the basis of bias or prejudice against 395 Associates rather than on the merits of the appeal. Paragraph 8(c) of the Amended Petition cites the following sentence from the reply brief (ODC Ex. 3 at p.1, note 1) to support this contention:

> "This is a typical tactic used by the County, in an effort to prejudice the Court against 395 based on the hope that the Court will decide the matter based upon any potential bias or prejudice that it may have against developer Frank Acierno, rather than on merits."

Respondent denies that any of the statements made in the opening or reply brief constitute violations of Rules 3.5(d) or Rule 8.4(d). In addition, Respondent asserts a number of affirmative defenses. Response to Amended Petition ¶¶14-22.

The September 13, 2006 Hearing Before the Board

The ODC offered the Superior Court briefs as exhibits at the Board hearing; it did not call any witnesses.

The Respondent, who represented himself, called as witnesses Brian Merritt, Esquire and Mary A. Jacobson, Esquire. Mr. Merritt is an attorney in the New Castle County Law Department. Ms. Jacobson is a former attorney in the New Castle County Law Department. Respondent also testified on his own behalf. His testimony primarily consisted of attempting to put the statements that he made in the opening and reply briefs into some context and offering justification for them. Respondent also offered several exhibits, some of which were admitted, and testified with respect to their relevance.[3]

In summary, Respondent testified that he believed that New Castle County officials had along standing grudge against Frank Acierno, the principal of 395 Associates, as well as the Respondent. For example, Respondent referred to political campaign statements made by a former County official, Sherry Freebery, that allegedly used Mr. Acierno and Respondent "as a foil in attempting to imply that we were bad people." Sept. 13, 2006 Tr. At 65. He also referred to political attacks made on Respondent when he ran for re-election to County Council Tr. 64-65. Respondent also testified to numerous lawsuits between New Castle County and Mr. Acierno involving shopping centers and housing developments and referred to litigation between the parties dating back to 1975. Id. at 65-66; 89-90.[4]

Respondent also explained that he believed that 395 Associates had not been treated fairly during the course of the 2004 administrative appeal to the LIRB. The LIRB rendered a verbal decision after a December 14, 2004 hearing denying 395 Associates' appeal and a written decision followed on December 30, 2004. Respondent testified that he believed that the written decision supplied reasoning for the denial of the appeal that was not articulated during the

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[3] Respondent's Exhibits 1-5 and 12-22 were admitted at the hearing. September r13, 2006 Tr. 69-94.

[4] See also Respondent's Exhibits 12-15 and pp. 25-29 of Respondent's Answering Memorandum dated November 14, 2006.

December 14, 2004 hearing. Id. at 70-71. Accordingly, against the backdrop and in light of prior litigation involving New Castle County and Mr. Acierno, Respondent felt that there had been outlandish conduct that he had to attack in his role as a zealous advocate. Id. at 86-88.[5] That, according to the Respondent, was his "mindset" that went into the statements made in the opening and reply briefs. Id. at 87.

Analysis of Disputed Violations

The ODC accuses Respondent of (1) violating Rule 3.5(d) by engaging in undignified or discourteous conduct that is degrading to a tribunal, and (2) violating Rule 8.4(d) by engaging in conduct prejudicial to the administration of justice.[6] The ODC must prove these violations by clear and convincing evidence. Delaware Lawyers' Rules of Disciplinary Procedure 15(c) and (d); see In Re Bailey, 821 A.2d 851, 863 (Del. 2003). The clear and convincing evidence standard requires evidence that produces an abiding conviction that the truth of the contentions is highly probable. In Re Bailey, 821 A.2d at 863.

1. Did Respondent Violate Rule 3.5(d)?

ODC argues that the "tone and choice of words" which Respondent used to make his argument crossed the line of acceptable advocacy and violated Rule 3.5(d). ODC Opening Memorandum at p. 1. ODC, however, has not provided the Board with any authority supporting the line which ODC urges the Board to draw in this case which the ODC itself acknowledges may fall in a "grey area." Id. at p. 2. The only Rule 3.5(d) disciplinary case in Delaware that ODC cites is In re Ramunno, 625 A.2d 248, 250 (Del. 1993).

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[5] See also p. 27 Respondent's Answering Memorandum (because of "history of County acrimony toward Acierno, and the County's seemingly never-ending and incessant efforts to harm his reputation and illegally deny him the right to use and develop his lands, Acierno must take very tough and stern positions...").

[6] ODC conceded at the hearing that there was not sufficient evidence to prove that Respondent violated the first prong of Rule 3.5(d) by engaging in conduct intended to disrupt a tribunal. Sept. 13, 2006 Tr. 109.

In Ramunno, an attorney referred to opposing counsel during a judicial office conference in a crude but graphic, anal term. The trial judge who heard the remark held the attorney in contempt and the matter was subsequently referred to discipline. The Supreme Court publicly censored the attorney for violating then Rule 3.5(c) which is now Rule 3.5(d).[7] Unlike this case, Ramunno involved objectively crude conduct for which the attorney had been held in contempt.

ODC's other Delaware cases, Kuang v. Cole Nat'l. Corp., 884 A.2d 500 (Del. 2005) and Paramount Communications v. QVC, 637 A.2d 34 (Del. 1994) are also distinguishable. Kuang is not a disciplinary case and it did not involve Rule 3.5(d). Rather, it dealt with fee shifting under the bad faith exception to the American Rule. The conduct at issue included excessive and duplicative deposition requests, obstreperous deposition conduct and a failure to provide substantive discovery responses. 884 A.2d at 507-08. In Paramount, the conduct involved "extraordinarily rude, uncivil and vulgar" deposition conduct and disparaging personal insults directed to opposing counsel.[8]

ODC argues that crude or vulgar language is not required to find a Rule 3.5(d) violation. ODC Opening Memorandum at pp. 5-7. The Board agrees that conduct need not be crude or vulgar to violate Rule 3.5(d). For example, in In re: Shearin, 721 A.2d 157 (Del. 1998), an attorney was found to have violated then Rule 3.5(c) for making disrespectful comments about the tribunal which did

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[7] Ramunno was decided under Rule 3.5(c), which is the predecessor to current Rule 3.5(d) and which contained the same relevant language.

[8] Paramount was not a disciplinary case. The Supreme Court did, however, state that "[i]t appears that at least Rule 3.5(c) [now Rule 3.5(d)]...is implicated here." 637 A.2d at 53 n.28. The Court further stated that if a Delaware lawyer had engaged in the misconduct committed by the Texas attorney, the Delaware lawyer would have been subject to censure or more serious sanctions. Id. at 55.

not involve crude or vulgar language. In Sonksen v. Legal Services Corporation, 389 N.W.2d 386 (Iowa 1986), a lawyer was censured for, among other things, using language that demeaned poor persons. Nevertheless, cases involving crude and vulgar conduct provide guidance as to the types of undignified or discourteous conduct found to be degrading to a tribunal under Rule 3.5(d) as do cases in which the conduct is otherwise disrespectful and demeaning of either the tribunal or the opponent.[9]

In contrast to the conduct at issue in Ramunno, Kuang and Paramount, the conduct here involved statements in briefs stating that the Respondent's opponent had embellished the written decision with reasons not articulated at the hearing. In an attempt to make his point, Respondent accused his opponent, among other things, of creating a "fictionalized account" and "fabricat[ing] conclusions." While Respondent's word choice was poor and his tone unnecessarily sarcastic, the Board is unable to conclude that Respondent violated Rule 3.5(d). For better or worse, attorneys frequently accuse their opponents of mischaracterizing, distorting, and sometimes even fabricating the record. The primary difference is that skillful and effective attorneys are able to make such arguments without the unnecessary invective and rhetoric used by Respondent. Given the clear and convincing standard of proof, the Board is unable to conclude that Respondent's "fabrication arguments" violated Rule 3.5(d)

ODC also argues that Respondent violated Rule 3.5(d) by using various inflammatory characterizations including calling his opponent's arguments "pure sophistry"

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[9] Respondent has prepared a summary of cases finding violations of Rule 3.5(d). These cases involve allegations of racial or religious bias, assertions of judicial improprieties; inappropriate sexual statements; intoxication; attacks on judicial integrity; harsh attacks on judicial rulings; and the use of profane and vulgar language. The Board believes that there may be other types of conduct not falling within one of these categories that violate Rule 3.5(d).

and "ridiculous." ODC also points to the "group of monkeys" argument in which Respondent attempted to make the point that written decisions of an administrative body should reflect the reasons articulated at the hearing. ODC argues that Respondent's various word and phrase choices should not be viewed in isolation but considered as part of the overall tone of Respondent's submissions. ODC Opening Memorandum p. 3. In response, Respondent points to decisions in which Delaware courts have used some of the same words that Respondent used including "sophistry", "laughable", "magically", and "ridiculous." Motion to Dismiss Amended Petition ¶¶29-32. Respondent, however, does not address ODC's argument that the words should not be viewed in isolation but rather cumulatively as part of the overall tone of the brief. Moreover, the cases on which Respondent relies involved limited and selective use of the words "sophistry", "laughable", "magically" and "ridiculous" and none of them contain the high degree of sarcasm that permeates Respondents' submissions.[10]

Although a close call, the Board is unable to conclude that the Respondent's characterizations considered along or cumulatively, violate Rule 3.5(d). The Board has struggled with this issue because the Respondent's briefs are unnecessarily strident and sarcastic. The difficulty, however, that the Board has in accepting ODC's argument is that it offers no objective standard against which to measure the conduct in question. Moreover, if the occasional use of certain words does not violate Rule 3.5(d), the Board is

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[10] Respondent also argues that his conduct is protected by the First Amendment. Respondent's Answering Memorandum pp. 29-33. Although it is not necessary to decide this argument in this case, the Board notes that an attorney does not have an unfettered constitutional right to say whatever he or she wants in representing a client in litigation. In re Guy, 756 A.2d 875, 878-79 and In re Shearin, 765 A.2d at 938 (citing Gentile v. Nevada Bar, 501 U.S. 1030, 1065 (1991) (ethical obligations of attorneys limit free speech rights as to statements made in capacity as attorney).

unable to determine at what point the cumulative effect of the words crosses the line and becomes degrading to the tribunal.

Finally, ODC argues that Respondent violated Rule 3.5(d) by implying that the Superior Court might rule on the basis of bias or prejudice against his client, rather than on the merits of the case before it. The Board, however, does not read the footnote in question (ODC Ex. 3 at p. 1, n.1) the same way ODC reads it. While inarticulate in its phrasing, the Board believes that Respondent was simply trying to suggest that the County tactically identified the principal of 395 Associates in the hope that mentioning the Acierno name would prejudice the Court against 395 Associates. The Board does not believe that Respondent was suggesting that the Court was or would, in fact, be biased in any way.

2. Did the Respondent Violate Rule 8.4(d)?

The ODC argues that the Respondent also violated 8.4(d) because his briefs were prejudicial to the administration of justice. The Rule 8.4(d) cases on which the ODC relies are distinguishable. In re Benge, 783 A.2d 1279 (Del. 2001) involved the timeliness of submissions to the Court, not the content of such submissions. In In re Guy, Del. Supr. No. 31, 1004, Berger, J. (May 5, 1994), Count 4, the count alleging a violation of Rule 8.4(D) – was dismissed by the Board. In re Mekler, Del. Supr. No. 571, 1992, V.C. CJ (Feb. 9, 1993), involved an attorney's knowing violation of the duty to make reasonable inquiry under Rule 11. The Certificate of Compliance cases on which ODC relies are similarly non-persuasive. While courts do rely on the parties' submissions, there is no clear and convincing evidence here that Respondent's briefs, while obnoxious, were prejudicial to the administration of justice.

Conclusion

Under the clear and convincing standard of proof, the Board is unable to conclude that Respondent violated either Rule 3.5(d) or Rule 8.4(d). As noted, this has been a difficult case for the Board. The Respondent has come close to crossing the line with respect to unprofessional litigation

conduct because many of the words he chose and the tone of his arguments were unnecessarily sarcastic and strident in tone. Nevertheless, under the applicable professional standard, the Board is unable to find violations of the Rules of Professional Conduct.

/s/ Elizabeth M. McGeever
Elizabeth M. McGeever,
Board Chair

/s/ Fred C. Sears, II
Fred C. Sears, II

/s/ Karen L. Valihura
Karen L. Valihura

Dated: December 20, 2006

PERTINENT CONSTITUTIONAL PROVISIONS

United States Constitution, Art. I, § 10

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, *ex post facto* Law, or Law inquiring the Obligation of Contracts, or grant any Title of Nobility.

United States Constitution, Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amend XIV, § 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.